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No. 3752

1302

United States
1 1302
Circuit Court of Appeals

For the Ninth Circuit.

OZMO OIL REFINING COMPANY, a Corpora-
tion, and PETROLEUM PRODUCTS COM-
PANY, a Corporation,

Plaintiffs in Error,

vs.

COTTON & COMPANY, Incorporated,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED

SEP 21 1921


F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

OZMO OIL REFINING COMPANY, a Corpora-
tion, and PETROLEUM PRODUCTS COM-
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vs.
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

WILLARD P. SMITH, Esq., Claus Spreckels
Bldg., and WALTON C. WEBB, Esq., Claus
Spreckels Bldg., San Francisco, California,
Attorneys for Plaintiff.

Messrs. THOMAS, BEEDY & LANAGAN,
Alaska Commercial Building, San Francisco,
California,
Attorneys for Defendants.

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, Second Division.

COTTON AND COMPANY, INC.,
Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PE-
TROLEUM PRODUCTS COMPANY,
Defendants.

Complaint for Breach of Contract.

Now comes the plaintiff and for cause of action
against the above-named defendants alleges:

I.

That plaintiff is now and at all times herein
mentioned was a corporation organized and exist-
ing under and by virtue of the laws of the State
of New York, with its principal place of business
at the city and county and State of New York

and that it was by virtue of its incorporation a citizen of the State of New York.

II.

That the defendant Ozmo Oil Refining Company was at all times herein mentioned and is now a corporation duly organized and existing under and by virtue of the laws of the State of California and that it was and is a citizen of said state, with its principal office at the city and county of San Francisco, in said state.

III.

That the defendant Petroleum Products Company was at all times herein mentioned and is now a corporation duly [1*] organized and existing under and by virtue of the laws of the State of California and that it was and is a citizen of said state, with its principal office at the city and county of San Francisco, in said state.

IV.

That on or about the 11th day of October, 1918, plaintiff and defendant Ozmo Oil Refining Company entered into an agreement in writing in and by which said agreement the defendant Ozmo Oil Refining Company agreed to sell and deliver to plaintiff seven hundred tons white semi-refined wax of 105 to 108 degrees melting point, similar to sample submitted, to be packed in double headed barrels, meaning oil barrels suitable for export; that said wax was to be delivered fifty tons per month to be shipped during each and every month beginning with November, 1918, and ending with December,

*Page-number appearing at foot of page of original certified Transcript of Record.

1919; that the price of said wax was to be 91¼¢ per pound in car lots f. o. b. San Francisco, California, said price subject to a discount of one per cent, shipments to be made sight draft attached to bill of lading and payable on presentation, irrevocable credit to be established in favor of the defendant Ozmo Oil Refining Company and subject to defendant Ozmo Oil Refining Company's demand every thirty days as wax was shipped; that the following is a copy of said contract, except that the said contract was not executed and delivered upon the date appearing upon the face of the same:

“This agreement, made and entered into this fifth (5th) day of September, nineteen hundred and eighteen (1918), by and between the Ozmo Oil Refining Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, party of the first [2] part, hereinafter called the ‘Seller,’ and Cotton and Company of Buffalo, New York, party of the second part, hereinafter called the ‘Buyer.’

WITNESSETH:

That in consideration of the promises and agreements hereinafter contained on the part of each of the parties hereto to be performed, the parties hereto do hereby agree as follows, to wit:

The Seller agrees to sell and deliver to the Buyer, and the Buyer agrees to purchase and receive from the Seller approximately Seven Hundred (700) tons of One Hundred Five (105) to One Hundred Eight (108) melting point, White Semi-refined Wax, similar to sample submitted and packed in

double headed barrels, (oil barrels, suitable for export).

DELIVERIES: Fifty (50) tons per month to be shipped during each and every month beginning with November, Nineteen Hundred and Eighteen (1918) and ending with December, Nineteen Hundred and Nineteen.

PRICE: The price of wax to be nine and one-quarter cents ($9\frac{1}{4}\phi$) per pound in car lots f. o. b. San Francisco, California. The above price being subject to a discount of one per cent (1%), shipments to be made sight draft attached to bill of lading, and payable upon presentation. Irrevocable credit to be established in our favor and subject to our demand every thirty (30) days as wax is being shipped.

DAMAGE CLAUSE: Neither party hereto shall be held liable for any damage or delays occasioned by, or arising out of strikes, riots, fires, insurrections, labor disturbances, [3] Seller's inability to secure cars for product referred to, or any other clause beyond Seller's control.

All deliveries hereunder, are to be made subject to Governmental regulations, or laws governing deliveries of products specified in this agreement, and any additional costs to the Seller for making deliveries because of such regulations or laws shall be borne by the Buyer.

SUCCESSORS IN INTEREST: It is expressly understood and agreed that this agreement shall bind the successors and assigns of the prospective parties hereto without express mention.

Your acceptance of the above in the space provided below shall constitute that a binding contract between us.

OZMO OIL REFINING COMPANY,

Seller.

(Signed) E. SWIFT TRAIN,
COTTON AND COMPANY, BUFFALO,

Buyer.

(Signed) A. P. LEON,
RUTGER, BLEECKER AND COMPANY,
Brokers,

(Signed) RUTGER BLEECKER."

V.

That the plaintiff herein complied with each and every condition and term of said contract on its part to be performed, but that the said defendant Ozmo Oil Refining Company failed to deliver any of said wax and failed to comply with said contract in every and all particulars, and that the plaintiff was damaged by reason of the premises in the sum of seventeen thousand dollars (\$17,000) and no part of the same has been paid. [4]

VI.

That more than three thousand dollars (\$3,000) is involved in the controversy set forth in the complaint herein.

VII.

That prior to the execution and delivery of the contract hereinbefore set forth between plaintiff and defendant Ozmo Oil Refining Company plaintiff informed defendant Ozmo Oil Refining Company and defendant Ozmo Oil Refining Company

well knew that plaintiff was about to purchase said wax for resale and on or about the 30th day of September, 1918, and prior to the execution and delivery of said contract, plaintiff sold 600 tons of said wax to the Standard Oil Company of New York, the same to be delivered 50 tons monthly from January to December, 1919, at $10\frac{1}{8}\text{¢}$ a pound f. o. b. San Francisco, California, terms cash; that the defendant Ozmo Oil Refining Company had and was given notice of the sale of the said wax prior to the execution and delivery of said contract hereinbefore referred to between plaintiff and defendant Ozmo Oil Refining Company.

VIII.

That plaintiff sold 100 tons of said wax at $10\frac{1}{2}$ cents per pound in car lots f. o. b. San Francisco, California, prior to the execution and delivery of said contract to Mitsui & Company, deliverable at San Francisco, of which sale defendant Ozmo Oil Refining Company had notice prior to the execution and delivery of the contract between plaintiff and defendant Ozmo Oil Refining Company hereinbefore referred to. That the said sales to the Standard Oil Company and Mitsui & Co. were not consummated because the defendant Ozmo Oil Refining Co. did not deliver any of the wax mentioned in the agreement between itself and plaintiff.

IX.

That subsequent to the said transaction set forth in the complaint herein the defendant Ozmo Oil Refining Company [5] consolidated with the de-

defendant Petroleum Products Company and said defendant Ozmo Oil Refining Company assigned and transferred all of its assets to the defendant Petroleum Products Company and said Petroleum Products Company assumed the obligations of defendant Ozmo Oil Refining Company arising out of the contract hereinbefore set forth and said liabilities of the said defendant Ozmo Oil Refining Company and agreed to pay the same, but the same has not been paid or any part thereof.

WHEREFORE, plaintiff prays judgment against defendants in the sum of seventeen thousand dollars (\$17,000), together with interest and costs.

WILLARD P. SMITH,

Attorney for Plaintiff,

1605 Claus Spreckels Bldg., San Francisco. [6]

State of California,

City and County of San Francisco,—ss.

Willard P. Smith, being duly sworn, deposes and says:

That he is attorney for the plaintiff in the above-entitled action; that he has read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and, as to those matters, he believes it to be true.

That the reason why this verification is not made by plaintiff is that plaintiff is a New York corporation and none of its officers reside or are now

within the City and County of San Francisco where
affiant's office is located.

WILLARD P. SMITH,

Subscribed and sworn to before me this 10th day
of October, 1919.

[Seal]

E. J. CASEY,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 10, 1919. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, Second Division.

COTTON AND COMPANY, INC.,

Plaintiff,

VS.

OZMO OIL REFINING COMPANY and PE-
 TROLEUM PRODUCTS COMPANY,
 Defendants.

Answer.

NOW COME the defendants and answering the complaint on file herein, admit, deny and allege as follows, to wit:

I, II and III.

Admit the allegations of paragraphs I, II and III of the complaint.

IV.

Admit the allegations of paragraph IV with the

following exceptions: Deny that the contract therein set forth was made on or about the 11th day of October, 1918, and in this respect, defendants allege that said contract was made, executed and delivered on the 5th day of September, 1918. Deny that said contract was not executed and delivered upon the date appearing upon the face of the same.

And in this respect defendants allege that on or about the 29th day of August, 1918, plaintiff and defendant Ozmo Oil Refining Company entered into an agreement in writing in and by which said agreement defendant Ozmo Oil Refining Company agreed to sell and deliver to plaintiff [8] seven hundred tons white semi-refined wax of one hundred and five to one hundred eight degrees melting point similar to sample submitted to be packed in double headed barrels. That said wax was to be delivered, fifty tons per month to be shipped during each and every month beginning with November, 1918, and ending with December, 1919. That the price of said wax was to be nine and one-quarter cents per pound in car lots f. o. b. San Francisco, California, subject to a discount of one per cent, shipments to be made sight draft attached to bill of lading and payable on presentation, irrevocable credit to be established in favor of said Ozmo Oil Refining Company and subject to Ozmo Oil Refining Company's demand every thirty days as wax was shipped.

V.

Deny that plaintiff complied with each and every or each or every or any condition or term of said

contract on its part to be performed. Deny that defendant Ozmo Oil Refining Company failed to deliver any of said wax, and in this respect, defendants allege that defendant Ozmo Oil Refining Company, in accordance with said contract, offered to deliver two separate lots of said wax to plaintiff, but that plaintiff refused to accept delivery of said wax or any of it. Deny that defendant, Ozmo Oil Refining Company, failed to comply with said contract in every and all or every or all or any particulars. Deny that plaintiff was damaged by reason of the premises or otherwise in the sum of seventeen thousand dollars, or any other sum.

VI.

Admit the allegations of paragraph VI. [9]

VII.

Deny that prior to the execution or delivery of the contract thereinbefore set forth between plaintiff and defendant Ozmo Oil Refining Company, plaintiff informed defendant Ozmo Oil Refining Company or that Ozmo Oil Refining Company well or otherwise knew that plaintiff was about to purchase said or any wax for resale. Alleges that defendants have not knowledge or belief about the matter sufficient to enable them to answer, and, basing their denial on that ground, they deny that on or about the 30th day of September, 1918, or prior to the execution or delivery of said contract, plaintiff sold six hundred tons of said wax or any amount of said wax to the Standard Oil Company of New York. Deny that the same was to be delivered fifty tons or any other amount monthly,

from January to December, 1919, or any other time, at ten and one-eighth cents a pound or any other sum a pound f. o. b. San Francisco, California, or elsewhere, terms cash, or otherwise. These defendants deny that defendant Ozmo Oil Refining Company had or was given notice of said or any sale of said wax prior to the execution or delivery of said contract thereinbefore referred to.

VIII.

Allege that these defendants have not knowledge or information on the subject sufficient to enable them to answer and basing their denial on that ground, they deny that plaintiff sold one hundred tons of said wax prior to the execution or delivery of said contract to Mitsui & Company, deliverable at San Francisco, or elsewhere. These defendants deny that defendant Ozmo Oil Refining Company had notice of [10] said sale prior to the execution or delivery of the contract between plaintiff and defendant Ozmo Oil Refining Company.

IX.

Admit the allegations of paragraph IX.

WHEREFORE, these defendants pray that the plaintiff take nothing by its complaint, but that they, the said defendants, have judgment against plaintiff for their costs herein expended.

THOMAS, BEEDY & LANAGAN,

Attorneys for Defendants. [11]

United States of America,
Northern District of California.
State of California,
City and County of San Francisco,—ss.

E. Swift Train, being duly sworn, deposes and says: That he is an officers, to wit, the vice-president of Ozmo Oil Refining Company, one of the defendants in the above-entitled action. That he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters, that he believes it to be true.

E. SWIFT TRAIN,

Subscribed and sworn to before me this 28th day of November, 1919.

[Seal]

ANNE F. HASTY,

Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of a copy of the within answer is hereby admitted this 28th day of November, 1919.

WILLARD P. SMITH,

For Plaintiff.

[Endorsed]: Filed Nov. 28, 1919. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [12]

(Title of Court and Cause.)

**Stipulation Waiving Jury and that Matter may Go
Over for the Term.**

IT IS HEREBY STIPULATED by and between

the parties to the above-entitled action that the jury in the above-entitled case is hereby waived, and further, that this matter may be continued for the term.

Dated: May 12, 1920.

WILLARD P. SMITH,
Attorney for Plaintiff.

THOMAS, BEEDY & LANAGAN,
Attorney for Defendants.

So ordered:

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed May 13, 1920. Walter B. Maling, Clerk. [13]

At a stated term, to wit, the March term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Wednesday, the 4th day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present, The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,296.

COTTON & CO., INC.

vs.

OZMO OIL REFINING CO., et al.

**Minutes of Court—May 4, 1921—Order Amending
Complaint, etc.**

* * * * *

By consent, it is ordered that the complaint may be amended on its face as follows: On page 5 at line 22 after the word, "wax" insert "at 10½ cents per pound in car lots f. o. b. San Francisco, California," ordered that said amendment be deemed denied.

* * * * *

The evidence being closed, counsel made their arguments to the Court, at the conclusion of which the cause being submitted and fully considered, it was ordered that judgment be entered in favor of plaintiff and against defendants upon findings to be filed. [14]

—

At a stated term, to wit, the March term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Tuesday, the 17th day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,296.

COTTON & CO., INC.,

vs.

OZMO OIL REFINING CO. et al.

**Minutes of Court—May 17, 1921—Order Amending
Complaint, etc.**

Upon motion of Willard P. Smith, Esq., and by consent of Jas. Lanagan, Esq., it is ordered that the complaint may be amended on its face as follows: On page 5 at line 27 add the following sentence to paragraph VIII, namely: "That the said sales to the Standard Oil Company and Mitsui & Co. were not consummated because the defendant Ozmo Oil Refining Co. did not deliver any of the wax mentioned in the agreement between itself and plaintiff"; and it is further ordered that said added matter be deemed to be denied. [15]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, Second Division.

No. 16,296.

COTTON AND COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETRO-
LEUM PRODUCTS COMPANY,

Defendants.

**Decision Embracing Findings of Fact and
Conclusions of Law.**

This case coming on regularly for trial on the
4th day of May, 1921, before this Court sitting with-

out a jury, a jury having been expressly waived by written stipulation filed herein, Willard P. Smith, Esq., and Walton C. Webb, Esq., appearing as attorneys for Cotton and Company, Inc., the plaintiff, and James Lanagan appearing as counsel and Thomas, Beedy and Lanagan, as attorneys for the defendants, Ozmo Oil Refining Company and Petroleum Products Company, and evidence, oral and documentary, having been offered upon each and all of the allegations and issues in said action, and the same cause having been thereupon submitted to the Court for its consideration and decision and the Court having fully considered all the matters both of law and fact submitted to it and being fully advised in the premises, now makes and renders its decision herein embracing its findings of fact and conclusions of law as follows, to wit: [16]

FINDINGS OF FACT.

The Court finds as follows:

I.

That plaintiff is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business at the City and County and State of New York, and that it was by virtue of its incorporation a citizen of the State of New York.

II.

That the defendant, Ozmo Oil Refining Company, was at all times herein mentioned and is now a corporation duly organized and existing under and by

virtue of the laws of the State of California and that it was and is a citizen of the said State of California, with its principal office at the city and county of San Francisco, in said state.

III.

That the defendant, Petroleum Products Company, was at all times herein mentioned and is now a corporation duly organized and existing under and by virtue of the laws of the State of California and that it was and is a citizen of said state, with its principal office at the city and county of San Francisco, in said state.

IV.

That on the 14th day of October, 1918, plaintiff and defendant, Ozmo Oil Refining Company, entered into an agreement in writing reading as follows:

“This agreement, made and entered into this fifth (5th) day of September, nineteen hundred and eighteen (1918), by and between the Ozmo Oil Refining Company, a corporation, [17] duly organized and existing under and by virtue of the laws of the State of California, party of the first part, hereinafter called the ‘Seller,’ and Cotton and Company of Buffalo, New York, party of the second part, hereinafter called the ‘Buyer,’

WITNESSETH:

That in consideration of the promises and agreements hereinafter contained on the part of each of the parties hereto to be performed, the parties hereto do hereby agree as follows, to wit:

The Seller agrees to sell and deliver to the Buyer,

and the Buyer agrees to purchase and receive from the Seller approximately Seven Hundred (700) tons of One Hundred Five (105) to One Hundred Eight (108) melting point, White Semi-refined Wax, similar to sample submitted and packed in double headed barrels (oil barrels, suitable for export).

DELIVERIES: Fifty (50) tons per month to be shipped during each and every month beginning with November, nineteen hundred and eighteen (1918) and ending with December, nineteen hundred and nineteen.

PRICE: The price of wax to be nine and one-quarter cents ($9\frac{1}{4}\phi$) per pound in car lots f. o. b. San Francisco, California. The above price being subject to a discount of one per cent (1%), shipments to be made sight draft attached to bill of lading, and payable upon presentation. Irrevocable credit to be established in our favor and subject to our demand every thirty (30) days as wax is being shipped.

DAMAGE CLAUSE: Neither party hereto shall be held liable for any damage or delays occasioned by, or arising out of strikes, riots, fires, insurrections, labor [18] disturbances, Seller's inability to secure cars for product referred to, or any other clause beyond Seller's control.

All deliveries hereunder, are to be made subject to Governmental regulations, or laws governing deliveries of products specified in this agreement, and any additional costs to the Seller for making

deliveries because of such regulations or laws shall be borne by the Buyer.

SUCCESSORS IN INTEREST: It is expressly understood and agreed that this agreement shall bind the successors and assigns of the prospective parties hereto without express mention.

Your acceptance of the above in the space provided below shall constitute that a binding contract between us.

OZMO OIL REFINING COMPANY,

Seller.

(Signed) E. SWIFT TRAIN.

COTTON AND COMPANY, BUFFALO,

Buyer.

(Signed) A. P. LEON.

RUTGER, BLEECKER AND COMPANY,

Brokers.

(Signed) RUTGER BLEECKER."

V.

That the plaintiff complied with all and every condition and term of said contract on its part to be performed, but that the defendant, Ozmo Oil Refining Company, failed to deliver any of said wax mentioned in said contract and failed to comply with said contract in every and all particulars.

VI.

That more than three thousand dollars (\$3,000) is involved in the controversy set forth in the complaint herein. [19]

VII.

That on or about the 30th day of September, 1918, and prior to the execution and delivery of

said agreement between the plaintiff and the defendant, Ozmo Oil Refining Company, plaintiff sold 600 tons of said wax to the Standard Oil Company of New York, the same to be delivered 50 tons monthly from January to December, 1919, at $10\frac{1}{8}$ cents a pound in car lots, f. o. b. San Francisco, California, terms cash, which sale was not consummated because the defendant, Ozmo Oil Refining Company, did not deliver any of the wax mentioned in the agreement between itself and the plaintiff.

VIII.

That plaintiff prior to the execution and delivery of said agreement between itself and the defendant, Ozmo Oil Refining Company, sold 100 tons of said wax to Mitsui & Company, the same to be delivered 50 tons monthly in November and December, 1918, at $10\frac{1}{2}$ cents a pound in car lots, f. o. b. San Francisco, California, which sale was not consummated because the defendant, Ozmo Oil Refining Company, did not deliver any of the wax mentioned in the agreement between itself and the plaintiff.

IX.

That prior to the execution and delivery of said agreement between plaintiff and the defendant, Ozmo Oil Refining Company, said defendant well knew and plaintiff informed it that plaintiff was about to purchase the wax mentioned in said agreement for resale and had resold the same, and that on September 17, 1918, plaintiff notified defendant, Ozmo Oil Refining Company, by letter that it intended to offer the wax in question for sale and on

September 30, 1918, it telegraphed defendant, Ozmo Oil Refining Company, that it had sold the [20] wax to responsible parties and on October 3, 1918, it wrote defendant, Ozmo Oil Refining Company, that the wax had been resold to responsible parties, which letter defendant, Ozmo Oil Refining Company, received on October 9, 1918, and on October 8, 1918, plaintiff wrote defendant, Ozmo Oil Refining Company, that it had sold the wax to the Standard Oil Company of New York and Mitsui & Company, which letter defendant, Ozmo Oil Refining Company, received on October 14, 1918.

X.

That subsequent to the said transaction set forth in the complaint herein the defendant, Ozmo Oil Refining Company, consolidated with the defendant, Petroleum Products Company, and said defendant, Ozmo Oil Refining Company, assigned and transferred all of its assets to the defendant, Petroleum Products Company, and said Petroleum Products Company assumed the obligations of defendant, Ozmo Oil Refining Company, arising out of the contract hereinbefore set forth and said liabilities of the said defendant, Ozmo Oil Refining Company, and agreed to pay the same, but the same has not been paid or any part thereof.

XI.

That the total price to be paid by the plaintiff under said contract for said 700 tons of match wax, at $9\frac{1}{4}\text{¢}$ a pound, was \$129,500; that the resale price of 600 tons of said wax to the Standard Oil Company of New York, at $10\frac{1}{8}\text{¢}$ a pound, was \$121,500;

that the resale price of 100 tons of said wax, at 10½¢ a pound, to Mitsui & Company was \$21,000; that the total resale price of said wax was \$142,500; that the difference between the contract price and the resale price was \$13,000; that said match wax was to be delivered monthly from November 30, 1918, to December [21] 31, 1919, payable cash on delivery by said purchasers, Standard Oil Company of New York and Mitsui & Company of San Francisco; that the average due date of said payments of said wax would be May 31, 1919.

XII.

That plaintiff has been damaged by reason of the premises in the sum of \$13,000, and interest from May 31, 1919, no part of which has been paid.

CONCLUSIONS OF LAW.

And as conclusions of law from the foregoing facts the Court finds and decides that plaintiff, Cotton and Company, Inc., is entitled to judgment against the Ozmo Oil Refining Company and Petroleum Products Company, the defendants, and each of them, in the sum of \$13,000 and interest from May 31, 1919, and costs to be taxed.

Let judgment be entered accordingly.

Done in open court this 17th day of May, 1921.

WM. C. VAN FLEET,

Judge.

Receipt of a copy of the within decision is hereby admitted this 17th day of May, 1921.

THOMAS, BEEDY & LANAGAN,

Attys. for Defts.

[Endorsed]: Filed May 18, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

(Title of Court and Cause.)

Judgment on Findings.

This cause having come on regularly for trial upon the 4th day of May, 1921, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed, Willard P. Smith and Walton C. Webb, Esqs., appearing as attorneys for plaintiff and James Lanagan, Esq., appearing at attorney for defendants; and the trial having been proceeded with and oral and documentary evidence on behalf of the respective parties having been introduced, and the evidence having been closed and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having filed its findings in writing and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Cotton and Company, Inc., plaintiff, do have and recover of and from Ozmo Oil Refining Company and Petroleum Products Company, defendants, the sum of fourteen thousand seven hundred eighty-seven and 15/100 (\$14,787.15) dollars, together with its costs herein expended taxed at \$78.70.

Judgment entered May 18, 1921.

WALTER B. MALING,
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk.

[Endorsed]: Filed May 18, 1921. Walter B. Maling, Clerk. [23]

(Title of Court and Cause.)

(Clerk's Certificate to Judgment-roll.)

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 18th day of May, 1921.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed May 18, 1921. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [24]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

Before Hon. WM. C. VAN FLEET, Judge.

No. 16,296.

COTTON & COMPANY,

Plaintiff,

vs.

OZMO OIL REFINING CO. et al.,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that this case came on regularly for trial in the above-entitled court on Wednesday, May 4, 1921, before the Honorable William C. Van Fleet, Judge of said court, without a jury. There appeared for the plaintiff Willard P. Smith, Esq., and Walton C. Webb, Esq., and for the defendants, Messrs. Thomas, Beedy & Lanagan.

The following proceedings were had:

Mr. SMITH.—In the complaint, on page 5, we have stipulated to amend, and would like to amend on the face of the complaint; there are only a few words to go in there. It is consented to by Mr. Lanagan for the defendant.

The COURT.—What is the proposition?

Mr. SMITH.—On page 5 of the complaint, paragraph 8, it reads:

“That plaintiff sold 100 tons of said wax prior to the execution and delivery of said contract.” [25]

We want to insert the price; we left out the price. We want to insert, “at 10½ cents per pound, in car lots, San Francisco.”

The COURT.—Very well, if there is no objection.

Mr. LANAGAN.—There is no objection, your Honor, but may we consider that that is denied?

The COURT.—Yes. Is this an action for damages?

Mr. SMITH.—This is an action for damages for breach of contract.

The COURT.—Is it without a jury? Has a jury been waived?

Mr. SMITH.—Yes, your Honor, a jury has been waived by a filed stipulation.

I will read, first, the deposition of CLAIR H. COTTON. This deposition was taken by stipulation, and all objections except as to the form of question were reserved.

Deposition of Clair H. Cotton, for Plaintiff.

My name is Clair H. Cotton. I reside at East Aurora, New York. My business address is 511 Liberty Building, Buffalo, New York. I am president of Cotton & Company, the complainant in this action. I was president in 1918. The company was engaged in business in Buffalo with a branch sales office at 37 Liberty Street, New York. Its business was the buying and selling of oils and wax as jobbers. I know the firm of Rutger, Bleecker & Company. They were brokers in 1918 in New York City. Cotton & Company at that time did no manufacturing, and oils or other material that it bought were bought for the purpose of resale only. Prior to August, 1918, the company had made inquiries from Rutger, Bleecker & Company and had received offers from them from time to time, but I cannot say whether any transactions had ever been closed with them before. I personally had nothing whatever to do with making this purchase through Rutger, Bleecker & Company, which is the subject of this action. I was in [26] New York in the latter part of September, 1918, more or less a great deal of the time, but I know I was there about the 25th, I may have got there a day or two before. I

(Deposition of Clair H. Cotton.)

know I was there about the 25th day of September, 1918. Mr. Leon, our sales manager, and myself met Mr. Salisbury of the Standard Oil Company in the lobby of the Hotel Astor. In the course of the conversation Mr. Salisbury asked me, us, what we were doing, what we had for sale, if we were doing any business. I replied to him that we had a substantial quantity of 105-108 melting point wax for sale and asked if he was interested. His answer to that was an inquiry where this match wax was located. I told him in San Francisco. He said he might be interested in the purchasing of match wax in San Francisco and that if we would make him a price and let him have it firmly in hand for a few days, I think until the following Saturday, that he thought he would buy it. He then asked us what the price was, and as Mr. Leon was our sales manager there, I looked at him and he replied 101 $\frac{1}{8}$ ¢ a pound f. o. b. San Francisco. That was substantially all of the conversation that took place at that time as far as I remember. That was the first talk that I had anything to do with anyone representing the Standard Oil Company in connection with this particular sale. I sold the Standard Oil Company before. Subsequently I returned to Buffalo. The original contract was made up in our office in New York, submitted to the Standard Oil Company and signed by one of their directors, Mr. Cole. It was customary for our New York office to always submit to us or send to us the original contract, together with an office copy. This original

(Depositions of Clair H. Cotton.)

contract and a copy were received at Buffalo on or about October 2d. The date of the stamp on the copy tells the exact date. I think it was October 2d. [27]

Q. Will you tell what efforts you have made to find the original contract?

A. Well, during the negotiations, and before the the contract of the Ozmo Oil Refining Company was finally closed, they requested us to open a letter of credit, and in order to open this letter of credit it was necessary for us to have the original signed contract of the Standard Oil Company to submit to the bank, which we did, and that it was kept by the bank for several months, in fact, all the time this letter of credit was in existence, and it was in existence from the time it was opened until the contract was finally canceled. Since that time, I have tried to get the contract from the Buffalo Trust Company, and they are unable to locate it. The document you show me is a copy of the original contract made with the Standard Oil Company and sent here from our New York office together with the original. The original was signed for the Standard Oil Company by Mr. Cole. I was familiar with his signature. The document is as follows:

Plaintiff's Exhibit "A."

MERCHANDISE CONTRACT.

COTTON & COMPANY, INC.

Office at New York City.

No. 133.

Date Sept. 30/18.

Standard Oil Co. of New York,

26 Broadway,

New York City.

We have this day sold you

Through _____

Commodity—PARAFFINE WAX.

Quantity —Six hundred (600) tons of two thousand (2,000) pounds each, (five per cent (5%) more or less).

Quality —105/8° M. P., White.

Packing —Tight, double-head barrels, suitable for export.

Shipment —Fifty tons (50) monthly, January to December, 1919, both months inclusive.

Price —Ten and one-eighth cents ($10\frac{1}{8}\phi$) F. O. B. San Francisco, Cal., per pound.

Weights —Shipped gross weights, less invoice tares.

Payment —Net cash, upon presentation of documents.

Shipping Instructions—To be furnished promptly by the buyers.

Conditions.— [28]

This sale is based upon the present regulations of the Federal, State and Municipal Governments, their departments and bureaus, and the present tariffs, taxes, duties, levies, imposts, assessments, freight rates, internal revenue and custom-house classifications and regulations, and any increased burden therein to be for buyer's account. In consideration of this sale, the buyer releases the seller from any liability or responsibility for delays, defaults or events growing out of contingencies beyond the seller's control, and the same shall not constitute a breach of contract nor exempt the buyer from accepting later shipments or deliveries. The seller shall not be liable for loss growing out of inability to secure facilities for moving shipment and while awaiting transportation, all loss in weights, charges for storage, labor, insurance or other expenses or losses incurred in handling shall be for buyer's account. Should any part of the merchandise above mentioned be jettisoned or lost at sea or while loading or *en route* or during discharge or while being transferred from one common carrier to another, or pending removal from the point of discharge, this sale is void to the extent of the loss. Deliveries within five per cent more or less of the amount of goods herein specified shall constitute fulfillment. A judgment obtained against the buyer, or his bankruptcy or insolvency or default in the payment of goods delivered by the seller on this or any other contract, or any other failure to comply with any of the terms of this or any other contract between the parties shall relieve the seller at his option as

to all portions of the contract undelivered. It is agreed between the parties that the goods above specified shall be separated into monthly shipments, each of which shall constitute a separate contract. No claim regarding quality shall be made unless ten per cent of the original unopened package be produced. This transaction is made under representation by the undersigned that there is not involved in connection therewith any trading directly or indirectly with, to, from, for or on account, behalf or benefit of any enemy or ally of any enemy of the United States or any transaction violative of the trading with the enemy act of the United States.

Accepted Oct. 2, 1918.

COTTON & COMPANY, INC.

By _____.

United States.

License

No.

G-08752

Food Administration.

Mr. A. P. Leon was sales manager in charge of our New York office. Most of the correspondence passed between our New York office and the Ozmo Oil Refining Co. in connection with this transaction. On September 26th I received a telegram from the Ozmo Oil Refining Company, which you now show me, addressed to Cotton & Company, Buffalo, New York. This telegram was as follows: [29]

Plaintiff's Exhibit "B."

WESTERN UNION TELEGRAM.

A666CH 34 NL.

1918, Sep. 25 PM 11 36.

San Francisco, Calif, 25.

Cotton & Co.,

Buffalo, New York.

In reference to tax contract will you be kind enough to establish irrevocable credit in our favor with your bank in order that the sight drafts may be taken up when presented and due.

OZMO OIL REFINING CO.

After receipt of that telegram I made arrangements with the Buffalo Trust Company for establishing this irrevocable letter of credit. On the 14th of October I communicated with the Ozmo Oil Refining Co. in regard thereto by a night letter, of which a copy is as follows:

Plaintiff's Exhibit "C."

POSTAL TELEGRAPH—TELEGRAM.

Buffalo, N. Y., October 14th, 1918.

NIGHT LETTER.

Ozmo Oil Refining Company,

San Francisco, Cal.

Signed contracts received and irrevocable letter of credit opened Buffalo Trust Company Buffalo, New York who will forward same direct to you Kindly arrange with Curtiss and Tompkins Chemists San Francisco to make analysis of each shipment and

forward their certificate attached your draft This
for our account.

COTTON COMPANY, INC.

Charge Cotton & Company, Inc.

At the same time I received a letter from the
Standard Oil Company with reference to its con-
tract with us, with shipping instructions. The let-
ter was dated October 14th, and it and the shipping
instructions were received at the New York office
and later sent on to me at Buffalo. The letter and
shipping instructions are, as follows:

Plaintiff's Exhibit "D."

Letter-head

STANDARD OIL COMPANY OF NEW YORK.

New York, October 14th, 1918.

Subject:

Orders covering 600
tons 105/108 White Wax.

Messrs. Cotton & Co., Inc.,

37-39 Liberty Street,

New York City. [30]

Dear Sirs:

We are enclosing herewith our orders Nos. 3539
to 3550 calling for total of 600 tons 105/108° White
Wax, covered by our Purchase Contract with you
dated Sept. 30th.

We are to-day forwarding copies of these orders to Mr. S. G. Casad, Standard Oil Co. (California) San Francisco, Cal.

Yours very truly,

H. E. COLE.

A.

General Foreign Order No. 3540.

New York, October 11, 1918.

Messrs. Cotton & Co.,

37-39 Liberty Street,

New York City.

Please deliver to S/S — Shipping Instruction Memo. No. —, Dated —. Pier —. Calls for Delivery, February, 1919. Port mark—Kobe.

Purchase Contract No.	Foreign Office Order No.	Packages. Num-ber.	Kind.	Merchan-dise.	Brand.	Marks and Numbers.	Remarks.
	Stock	50	Tons	105/108	M. P. Match	⬢C⬢	1/up
				White	Wax		
		2000	lbs.	3% Oil & moisture			

Charge S. O. Co. of N. Y. Asiatic Consignment. Mail Invoice and address correspondence to H. E. Cole, Room 1306, 26 Broadway, N. Y.

To be packed in double-headed barrels, suitable for export.

Shipment to be made in the name of the Standard Oil Co. of New York consigned to Mr. S. G. Casad, Standard Oil Co., California, 200 Bush St., San Francisco, Cal.

For Export Lighterage Free.

Bills of Lading to be mailed to Mr. S. G. Casad, Standard Oil Co., California, 200 Bush St., San Francisco, Cal.

PLEASE FURNISH BILLS IN DUPLICATE.
CHARGE ASIATIC CONSIGNMENT AC-
COUNT AND PLEASE FURNISH DUPLI-
CATE WEIGHT RETURNS.

Packages for each port must be stowed separately on lighter in such manner that they may be delivered by ports (each port separately) in the order required as shown in Shipping Instructions which are to follow.

If any of above parcels are short shipped, notify N. Y. office to cancel and they will issue new [31] order if necessary.

It is of utmost importance that we be notified immediately upon receipt of order of any shortage, so that an additional quantity may be ordered to take place of quantity short.

CLAUSE.

Goods Manufactured in U. S. A. NOT to appear on packages.

We will furnish you with Shipping Instruction Memo. on or about —, 191—, giving you at least 3 days' notice of required delivery.

STANDARD OIL CO. of N. Y.

Export Order and Sales Dept., Room 1204.

C. L. C.

Per _____.

General Foreign Order No. 3539.


New York, October 11, 1918.

Messrs. Cotton & Co.,

37-39 Liberty Street,

New York City.

Please deliver to S/S — Shipping Instruction Memo. No. —, Dated —. Pier —. Calls for Delivery, January, 1919. Port Mark—Kobe.

Purchase Contract No.	Foreign Office Order No.	Packages. Num-ber.	Kind.	Merchan-dise.	Brand.	Marks and Numbers.	Remarks.
	Stock	20	Tons	105/108 M. P.	Match		1/up
		2000 lbs.	White	3%	Wax		
			Oil &				
			Moisture				

To be packed in double-headed barrels, suitable for export.

Shipment to be made in the name of the Standard Oil Co. of New York consigned to Mr. S. G. Casad, Standard Oil Co., California, 200 Bush St., San Francisco, Cal.

For Export Lighterage Free.

Bills of Lading to be mailed to Mr. S. G. Casad, Standard Oil Co., California, 200 Bush St., San Francisco, Cal.

PLEASE FURNISH BILLS IN DUPLICATE.

Charge S. O. Co. of N. Y. Asiatic Consignment. Mail Invoice and address correspondence to H. E. Cole, Room 1306, 26 Broadway, N. Y.

CHARGE ASIATIC CONSIGNMENT ACCOUNT AND PLEASE FURNISH DUPLICATE OF WEIGHT RETURNS.

Packages for each port must be stowed separately on lighter in such manner that they may be delivered by ports (each port separately) in the order required as shown in Shipping Instructions which are to follow. [32]

If any of above parcels are short shipped, notify N. Y. office to cancel and they will issue new order if necessary.

It is of utmost importance that we be notified immediately upon receipt of order of any shortage, so that an additional quantity may be ordered to take place of quantity short.

CLAUSE.

Goods Manufactured in U. S. A. NOT to appear on packages.

We will furnish you with Shipping Instruction Memo. on or about —, 191—, giving you at least 3 days' notice of required delivery.

STANDARD OIL CO. OF N. Y.

Export Order and Sales Dept.,

Room 1204.

CLC.

I subsequently received the letter of January 31st from the Standard Oil Company now shown me. That letter is as follows:

Plaintiff's Exhibit "E."

Letter-head

STANDARD OIL COMPANY OF NEW YORK.

New York, January 31st, 1919.

Subject:

Deliveries against Contract #133
covering 50 tons Match Wax
monthly during year 1919.

Messrs. Cotton & Co., Inc.,

37-39 Liberty Street,

New York City.

Dear Sirs:

We confirm herewith recent conversation with

Mr. Mauresberg, of your Company, in which he took the stand that it was in order for your Company to tender to us the monthly portion of our Contract #133 in New York or any other city.

This is not in accordance with the terms of the contract, which contemplates the tendering to us in San Francisco of 50 tons, each month—beginning January, 1919, at price of $10\frac{1}{8}$ cts. per lb. f. o. b. steamer, San Francisco, Cal.

We understand from the Standard Oil Co. (California) that you have made tender of the January quantity but that same tested 15.76% moisture instead of 3% as per contract.

This tender was not in accordance with the contract and was, of necessity, rejected.

We have not heard from Mr. S. G. Casad of the Standard Oil Co. (California), San Francisco, Cal., who is attending to the bookings of export freight for our account, as to whether or not a legal tender has been made of the 50 tons in question, for shipment by us during the month of January.

Unless, therefore, tender is made for shipment [33] on or before February 10th, we will be compelled to cancel the January portion of this contract.

In extending the time to Feb. 10th in the present instance, same is not to be considered as a precedent for extensions of any other deliveries in any subsequent months, and is done without prejudice to our rights under the contract of receiving 50 tons in January and each of the subsequent months, up to and including December, 1919.

You will therefore please accept this letter as

(Deposition of Clair H. Cotton.)

notice upon you to the effect that unless the 50 tons for January are tendered us at San Francisco, for export shipment on or before Feb. 10th, same is cancelled forthwith, and unless subsequent monthly quantities are tendered at San Francisco for export shipment within the months named, they are likewise cancelled from the total quantity of this contract.

Trusting you will advise us promptly as to what tender you have made for shipment by us from San Francisco, during the month of January and what tender you expect to make at San Francisco for shipment by us during the month of February, we are,

Yours very truly,

H. E. COLE,

W.

WRW:EP.

None of the wax called for by the contract with the Ozmo Company was delivered to Cotton and Company nor to those to whom it had resold in the month of November. Nothing was delivered or tendered in the month of November or December. With reference to the delivery or tender of the wax we had telegraphed demanding delivery and the Ozmo had promised us continuously that they would make delivery. They finally stated that they would be late in making delivery, and when the tender of the wax was finally made that did not meet with specifications, the wax was rejected by the Standard Oil Company. Some correspondence ensued between our company and the Ozmo Oil Company in

(Deposition of Clair H. Cotton.)

regard to that which is contained in this file of correspondence. It shows the subsequent dealings that we had with the Ozmo Company in efforts to obtain delivery. In general, the correspondence showed that their attitude at all times was that they would make delivery as soon as they could get it, and they kept promising us that we could expect delivery in a short time, sometimes they said we will be able to deliver on stipulated date, which shows by the correspondence, and [34] I cannot remember them.

Q. Did you attempt to buy any of this was on the market?

A. We made inquiry but did not dare make purchases in view of the fact that they insisted they were going to compel us to take delivery of this wax which they claimed all the time they could furnish. Our contract with the Standard Oil Company was finally cancelled by the Standard Oil Company. The reason given was that we had failed to make delivery in accordance with the specifications, and that they had lost valuable freight space which had advanced since they had engaged it, and that they could not accept delivery for these two reasons. They gave us on one or two occasions an extension until the tenth of the following month within which to perform, but no delivery was made either then or in time for us to make the tender to them, and when tenders were finally made, as I said before, the wax was not up to specifications and was refused on that account. We received the contract

(Deposition of Clair H. Cotton.)

of the Ozmo Oil Company in its final form on October 14, 1918. I fixed that date because we immediately telegraphed the Ozmo that the contracts had been received and that the irrevocable letter of credit had been opened through the Buffalo Trust Company in their favor. Our contract with the Standard Oil Company was in car lots. Just a minute; it was stipulated that this delivery was to be made 50 tons a month, but in carload lots. I drew our contract with the Standard Oil which specifies for shipments 50 tons a month. That contemplates delivery in carload lots. We were not to be put to any expenses in handling that under our contract with the Standard Oil Company. During the time that the negotiations were being carried on with reference to this contract I was frequently back and forth from New York City. The character of the negotiations and proposed changes were reported [35] to me every week. The Mitsui Company referred to in Mr. Leon's testimony as one of the concerns to whom part of this wax was sold has an office in San Francisco, Seattle and New York to my knowledge. Their head office is in Japan. This sale was made to their San Francisco office. I had no knowledge of that until after, later. That was a written contract. I have not the written contract here unless it is in the file. The Mitsui Company has a duplicate in San Francisco.

Cross-examination.

I had nothing to do with the alleged negotiations concerning the purchase of the wax in question

(Deposition of Clair H. Cotton.)

from the defendant. My New York sales manager, A. P. Leon, conducted these negotiations. The negotiations were first started between Mr. Leon for us and Mr. Rader of Rutger, Bleecker & Co., by telephone. I understand that there was a letter then written by the Rutger Bleecker Co. to our company dated August 29, 1918. The letter is the same as you now show me. The letter is as follows:

Defendants' Exhibit "A."

Letter-head

RUTGER, BLEECKER & Co.,
New York.

August 29th/1918.

The Cotton Co.,
37 Liberty St.,
New York City.

Gentlemen:

Attention of Mr. Leon.

We hereby confirm having sold to you for account of sellers on the Pacific Coast, who we believe are the Osmo Oil Refining Co, San Francisco but subject to correction if any, 50 tons of Paraffine Wax monthly from November 1918, to December 1919 inclusive, in all 700 tons, quality—White Semi Refined, 105 to 108 degrees melting point not over 3% oil and moisture packed in tight barrels at 9¼¢ per lb. F. O. B. San Francisco, terms Net cash sight draft with bills of lading attached Pacific coast weights.

Official contract is being forwarded by our San

Francisco office and in the meantime as confirmation we would suggest that you sign duplicate letter attached herewith.

Yours very truly,

RUTGER, BLEECKER & CO.

Per B. RADER.

BR:MM. [36]

Our company in reply to that letter wrote to Rutger, Bleecker Co. on August 31st. Our letter is as follows:

Defendants' Exhibit "B."

August 31, 1918.

Rutger, Bleecker & Co.,

#87 Wall St.,

New York City.

Attention Mr. Rader.

Gentlemen:

We have your favor of the 29th inst., and confirm having purchased, through you, from the Ozmo Oil Refining Co., of San Francisco,

Seven hundred tons of Paraffine Wax, white, semi-refined, 105/8° M. P., containing not over 30% oil and moisture, packed in double head barrels, for shipment fifty tons monthly, from November, 1918, to December, 1919, inclusive, at 9¼¢ per lb. fob. San Francisco.

Terms net cash, sight draft attached bills of lading; Pacific Coast, gross weights less actual tares, as per licensed weighmaster's returns.

(Deposition of Clair H. Cotton.)

We are returning signed copy of your confirmation, as per your request, and await contracts, in order that we may send confirming purchase order.

Trusting that we shall be able to put through some more business together, before long, we are

Yours very truly,

COTTON & COMPANY, INC.

APL.BS.

Sales Manager.

After those letters there was a contract entered into between the complainant and defendant. The contract in question was the contract prior to the one that my counsel has referred to in his direct examination. I don't know anything about any contract other than the one my counsel referred to in his direct examination. The only contract that I recall is a contract dated the 5th day of September. It may be possible that another form was submitted, but if it was, it was returned without my knowledge of its having been received, so far as I can recall now. [37] So far as I know, the only contract between the complainant and defendant is this contract dated the fifth of September. That contract was from time to time modified. This contract was made pursuant to the correspondence and conferences between the complainant and Rutger, Bleecker & Co. as set forth in the exhibits, comprising letters which have been offered in evidence on the part of the defendant.

Q. And this contract in question is the paper which I show you?

(Deposition of Clair H. Cotton.)

A. This contract here was not a completed contract until after these corrections were made.

It was the contract in question dated September 5th, the one we have been referring to with the modifications later made. It was as follows:

Defendants' Exhibit "C."

THIS AGREEMENT, made and entered into this fifty (5th) day of September, Nineteen Hundred and Eighteen (1918) by and between the OZMO OIL REFINING COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of California, party of the first part, hereinafter called the "Seller," and COTTON AND COMPANY of Buffalo, New York, party of the second part, hereinafter called the "Buyer,"

WITNESSETH:

That in consideration of the promises and agreements hereinafter contained on the part of each of the parties hereto to be performed, the parties hereto do hereby agree as follows, to wit:

The seller agrees to sell and deliver to the Buyer, and the Buyer agrees to purchase and receive from the Seller approximately Seven Hundred (700) tons of One Hundred Five (105) to One Hundred Eight (108) melting point, White Semi-refined Wax, similar to sample submitted and packed in double headed barrels, (oil barrels, suitable for export).

(Deposition of Clair H. Cotton.)

DELIVERIES: Fifty (50) tons per month to be shipped during each and every month beginning with November, Nineteen Hundred and Eighteen (1918) and ending with December, Nineteen Hundred and Nineteen.

PRICE: The price of wax to be nine and one quarter cents ($9\frac{1}{4}\text{¢}$) per pound in car lots f. o. b. San Francisco, California. The above price being subject to a discount of one per cent (1%), shipments to be made sight draft attached to bill of lading, and payable upon presentation. Irrevocable credit to be established in our favor and subject to our demand every thirty (30) days as [38] was is being shipped.

DAMAGE CLAUSE: Neither party hereto shall be held liable for any damage or delays occasioned by, or arising out of strikes, riots, fires, insurrections, labor disturbances, Seller's inability to secure cars for product referred to, or any other cause beyond Seller's control.

All deliveries hereunder, are to be made subject to Governmental regulations, or laws governing deliveries of products specified in this agreement, and any additional costs to the Seller for making deliveries because of such regulations or laws shall be borne by the buyer.

SUCCESSORS IN INTEREST: It is expressly understood and agreed that this agreement shall bind the successors and assigns of the prospective parties hereto without express mention.

Your acceptance of the above in the space pro-

(Deposition of Clair H. Cotton.)

vided below shall constitute this a binding contract between us.

OZMO OIL REFINING COMPANY,

Seller.

E. SWIFT TRAIN.

COTTON AND COMPANY, BUFFALO,

Buyer.

A. P. LEON.

RUTGER, BLEECKER AND COMPANY,

Brokers.

RUTGER BLEECKER.

We began our conferences with the Standard Oil Company somewhere around September 25th.

Q. And on the 14th of October the Standard Oil Company sent you orders for the purchase of 600 tons of white wax?

A. No, they are not orders. They are simply shipping instructions. They are instructions to ship in reference to a contract made September 30th. We have a copy of that contract made September 30th marked in evidence. I refer to Complainant's Exhibit "A" marked for identification as being a copy of the contract between complainant and the Standard Oil Company. The original contract shows an acceptance by the Standard Oil Company. I say that the Buffalo Trust Company, who had the original contract the last I know of, have been unable to locate it so far. [39]

Q. What you term as being shipping instructions from the Standard Oil Company, attached to Complainant's Exhibit "B" marked for identification,

(Deposition of Clair H. Cotton.)

call for according to the letter thereto attached, 600 tons white wax. Is that right?

A. No. This letter refers to our contract and these shipping instructions call for 50 tons of 2,000 lb. each. These are the original shipping instructions received by us. These shipping instructions were not signed by any officer of the Standard Oil Company, but only by the Standard Oil Company's printed signature. There is a place for a signature by the person having the matter in charge, and that signature is in blank.

The contract between the complainant and defendant bearing date September 5, 1918, was delivered to us around about the 14th of October, 1918.

Q. That is the time that you wish to have the contract effective? Is that correct?

A. That is correct, yes. At this time we had resold 100 tons to Mitsui & Company, San Francisco, six hundred tons had been sold to the Standard Oil. I think the Mitsui contract is in my attorneys' hands in San Francisco. I do not know when we sold to Mitsui. That transaction with Mitsui was handled entirely by the New York office. I would have to examine the telegram sent to the defendant to tell when we gave notice of a resale to the defendant. I do not know if that telegram was sent from this office or from New York, but a telegram was sent notifying them of the resale. I don't recall the date without refreshing my memory. It was sent before the completion of the contract between the complainant and the defendant. I don't know if

(Deposition of Clair H. Cotton.)

I sent it, without examination of the correspondence, because I don't know if it was sent from New York or Buffalo. I did not testify that it [40] was sent before because I would like to have it sent before the contract was made, but because that is my memory of it. That telegram was sent by our New York office. The contract wax was referred to in the telegram. Our contract was not in existence at the time this was sent. Thereupon the telegram was introduced in evidence. It was as follows:

Defendants' Exhibit "F."

POSTAL TELEGRAPH—TELEGRAM.

1:35 P. M., September 30, 1918.

Ozmo Oil Refining Co.,
San Francisco, Cal.

Referring our contract wax is this material packed tight iron hooped oil barrels If not wire exact packing mentioning material number hoops etc Do you require bank guarantee entire contract or monthly Perfectly willing cooperate with you but in return must ask you post guarantee for performance contract This material sold responsible buyers Reply immediately Thirty-seven liberty street.

COTTON & COMPANY, INC.

Charge.

We received a telegram dated September 25th sent by the Ozmo Oil Refining Co., which has already been marked in evidence. I do not know that this contract was completed before October 14, 1918.

Q. You have in your correspondence referred to

(Deposition of Clair H. Cotton.)

wax contract as having been made with the defendant, haven't you?

A. A contract form had been submitted but had not been completed in all its details, inasmuch as there were a number of changes which had to be made.

Q. Those changes had not come up at that time, had they?

A. They came up as soon as the typewritten form of the contract was received and we saw how the contract had been drawn.

Q. Yet the contract had been made in the correspondence between Cotton & Company and Bleecker & Company? [41]

A. A form of contract had been submitted by Rutger Bleecker & Co.

Q. You had agreed upon all of the terms of sale and purchase in your correspondence with Rutger Bleecker Company so far as you knew them at that time?

A. I cannot answer that question because that was handled by our New York office. This contract with Mitsui was cancelled later for failure to deliver.

Q. Is that your signature? A. It is not.

Q. C. H. Cotton?

A. My name but not my signature.

Q. Well, I show you what purports to be a letter written by Cotton & Company to the Ozmo Oil Refining Co. and ask you if complainant did not cause that letter to be sent bearing date December 17, 1918.

A. This letter was written by my Secretary and I don't think that I dictated it. Apparently not,

(Deposition of Clair H. Cotton.)

it was dictated by my secretary, evidently in my absence.

Q. The Secretary had the authority to write letters, didn't he?

A. She did not have any authority to write letters binding us to anything.

Q. Do you disclaim responsibility for that letter?

A. I don't recall anything about that letter. The duties of my secretary are that she handles some of the detail work in arranging shipments during my absence. She did it by my authorization. When questions came up that she had reason to believe required immediate action, she had authority to take [42] action only with reference to matters of detail of shipping. I do not mean with reference to those things satisfactory and not unsatisfactory to the company. I mean what I testified to.

Defendants' Exhibit "G" was offered in evidence, as follows:

Defendants' Exhibit "G."

Letter-head

COTTON & COMPANY, INC.

Buffalo, N. Y.

December 17th, 1918.

Ozmo Oil Refining Co.,

433 California Street,

San Francisco, Cal.

Gentlemen:

In regard to the November shipment of Wax, there is no particular use in going over the details

of the delay in getting this shipment out. The thing to do now is to figure a way to work it out without hardship to anyone.

We infer from your correspondence that it will probably be difficult for you to get the November lot out and at the same time keep up shipments on the other lots. We therefore suggest the following plan.

Our contract of sale on the six hundred (600) tons for next year, gives us the privilege we believe of shipping 5% more or less on each months consignment and our plan is to make a little addition to each shipment, working these extra fifty tons off in this way.

In other words, instead of shipping exactly fifty tons in each case, ship 5% more than fifty tons and we can probably arrange to get rid of the whole lot in this way.

We are asking you to co-operate with us in this matter without prejudice to our claim that the delay in shipping and notification of your inability to ship relieves us of our responsibility to take the goods.

In other words, we do not want to work any hardships to your good selves or to our own interests, but want to find a way to co-operate that will get rid of the merchandise. We think that you will agree with us that this is a fair and equitable way for all concerned.

Please keep us posted well in advance of the situation at your refinery so that we will be in a position to meet any other emergency that may come up.

Mitsui & Company were a little technical in this matter, but we do not believe our other customer will be. [43]

The decline in the price of Match Wax was undoubtedly Mitsui's reason for taking the position they did.

You will find it is always our intention to work with you very closely and we are confident that we can do a lot of business with you on Paraffine Wax and also on lubricating oils.

In connection with this last item we would like to have samples of your principal stocks as there is usually a good market in the East for these products. We would also like to know what position you are in to ship in barrels, as well as in tank cars and if you have your own tanks, and if not whether you will have any difficulty in obtaining tanks for Eastern shipments.

Wishing you the compliments of the season, we are

Very truly yours,
COTTON & COMPANY, INC.
C. H. COTTON,
S.
President.

United States

License

No.

G-08752

Food Administration.

FMS/F.

I do not recall the date when the Mitsui contract

(Deposition of Clair H. Cotton.)

was cancelled. That contract was handled entirely by our New York office so far as I recall. I have no direct first hand handling of that transaction. I haven't any first hand knowledge of that transaction. I believe the Mitsui contract was signed by our Mr. Leon. I do not know who signed it for the Mitsui Company, and I do not know when it was signed. I could not give you the date when it was cancelled. I know it was reported cancelled from our New York office and that no shipments were made on it. I know Mr. Leon's signature. The letter dated October 15, 1918, which you show me is signed by Mr. Leon.

Q. You know what Mr. Leon had in mind when he said that one of the parties to whom the material was sold seems to have some doubt on the subject and we simply wish definite assurance in this matter before closing with them?

A. As far as I knew the only thing he had in mind was with reference to how the material was to be packed. I do not know [44] to whom he referred by "them." The letter of October 15, 1918, was offered in evidence, and is as follows:

Defendants' Exhibit "H."

Letter-head

COTTON & COMPANY, INC.

New York.

October 15, 1918.

Ozmo Oil Refining Co.,

#433 California St.,

San Francisco, Cal.

Gentlemen:

We are in receipt of your valued favor of October 10th, contents of which have had our careful attention.

We wish to thank you for your clear and comprehensive explanation of the circumstances in connection with our purchase of Matchwax, and wish to say, that if all this information had been in our hands originally, there would have been a saving of much needless correspondence. We, of course, appreciate the fact that you would desire some protection on such a long-term contract, and are perfectly willing to arrange same. In fact, we have, today, received a letter from our Buffalo office, advising us that they had opened a letter of credit with the Buffalo Trust Company, in your favor, and in accordance with the terms of your contract.

We were rather surprised that you paid no attention to our wire regarding packing, and while we were quite confident that double head barrels referred to the packing you mentioned, one of the parties to whom the material was sold, seemed to have some doubt on the subject, and we simply

(Deposition of Clair H. Cotton.)

wished definite assurance in this regard before closing with them.

However, all this uncertainty has now been cleared up to our satisfaction, and we trust there will be no further difficulty with regard to the matter.

We are always interested in Paraffine Wax, in all grades and melting points, and trust that you will communicate with us promptly, should you have any further quantities to offer, for any shipment.

We appreciate fully, the spirit in which your letter was written, and awaiting your further favors, we are

Yours, for the Fourth Liberty Loan,
COTTON & COMPANY, INC.

A. P. LEON,

Sales Manager.

United States

License

No

G-08752

Food Administration

APL. BS. [45]

Redirect Examination.

In my testimony with reference to the contract and modification or changes, I do not want to be understood as passing on the legal effect of the transaction. I have no personal knowledge of this contract with the Osmo Company except what I got from the correspondence and the contract itself, only what I did in Buffalo by way of establishing letter of credit. I first received any document

(Deposition of Clair H. Cotton.)

in the form of a contract bearing the signature of the Ozmo Oil Refining Co. about October 14, 1918. As I understand it, the entire transaction is covered by this correspondence passing between Cotton & Company and Rutger Bleecker & Co. and the Ozmo Oil Refining Co. That's as I understand it so far as the contract of purchase itself is concerned.

The deposition of A. PERCY LEON was taken on behalf of plaintiff by stipulation, all objections being reserved, and is as follows:

Deposition of A. Percy Leon, for Plaintiff.

My name is A. Percy Leon; I reside at No. 204 Hamilton Avenue, New Rochelle, New York. My business address is 35 South William Street, New York City. I have been in business for myself for about two years. I was with Cotton & Company, plaintiff herein, as their Sales Manager before I went into business for myself. I was in the employ of Cotton & Company in the year 1918. I had charge of a transaction relating to the purchase by Cotton & Company from Ozmo Oil Refining Co. of 700 tons of (105, to 108 Melting Point) white, semi-refined wax, similar to samples that were or were to be submitted, which wax [46] was to be packed in double-headed barrels. I had charge of that purchase for Cotton & Company. It was made through Rutger Bleecker & Co., brokerage firm at 87-89 Wall Street, New York City.

Q. Did they represent and act for Ozmo Oil Refining Co.?

(Deposition of A. Percy Leon.)

A. No more than any other principal for whom they might be offering or purchasing a commodity.

Rutger Bleecker offered the wax to Cotton & Company. Mr. Rader of Rutger Bleecker & Co. called me up. I cannot remember his exact words, but he offered 700 tons of wax at a price, and we made them a bid somewhat lower than their offer and they accepted the bid. None of the wax was delivered up to the time I left Cotton & Company, which was early in March, 1919. The negotiations for the purchase of this was extended over a few weeks time. The contract for the purchase and sale of this wax was put in writing. I had to do with this agreement. The agreement as first submitted was not satisfactory to either party and another written agreement was made and the latter one had to be further modified. The first modifications as I remember them related to the fact that Ozmo Oil Refining Co. demanded a letter of credit and Cotton & Company demanded that the quantities be specific. After the first contract was submitted Ozmo requested that a new contract be drawn up satisfying a letter of credit to be established in San Francisco. The original contract specified deliveries of from 500 to 700 tons of the wax over the contract period with deliveries of from 35 to 50 tons per month, and Cotton & Company insisted that it be specific and struck out the 500 and 35 and made it 700 tons over the contract period with deliveries of 50 tons per month as the goods had been sold.

Q. During these negotiations I told Rutger

(Deposition of A. Percy Leon.)

Bleecker & Co. through their Mr. Rader, before the original contract was signed [47] that we had resold this wax. I cannot fix the date when I gave them notice. I simply know it was before any contract was signed. I cannot remember whether I told him to whom we had resold the wax or not. To the best of my knowledge, Cotton & Company never paid anything to Rutger Bleecker & Company as commission or compensation for their services in connection with this transaction. They were not supposed to as it was not the custom in the business.

Cross-examination.

I am sales manager with Cotton and Company. I have not been with them since March, 1919, so that if a payment or delivery had been made under this contract I would not know, except through meeting Mr. Cotton, who has advised me that no delivery has been made. Otherwise than that I do not know of my personal knowledge Rutger Bleecker & Co., as I recall it, called us first and made us the offer that they had received from their principals. Cotton and Company had done business with Rutger Bleecker & Co. to some extent before that, for some time. I recognized Mr. Rader's voice over the telephone as I knew him very well. I do not exactly recall whether Mr. Rader mentioned any special person or company from whom he expected to procure the wax. Mr. Rader and I had been on rather confidential terms and frequently he would name his principals before I had either accepted or rejected his offer, but I do not recall whether he did so in this instance

(Deposition of A. Percy Leon.)

or not. I do not remember the first date that I discovered that the wax was to be gotten from the Ozmo Oil Refining Co., but it was within a day or so after the original offer. There was an agreement drawn up in writing and which was submitted to us and modified by Ozmo before we had signed it, and was also rejected by us. It was not subsequently signed by us. The original was returned to them rewritten and a new contract submitted. [48]

Q. Then Mr. Leon, it is your understanding that there was never but one written contract entered into between the parties?

A. Well, a contract is not a contract until it is signed, and a contract is not formally signed until all the parties agree to it, and the minds of these two parties had not met until both agreed upon the points of dispute. One written contract was entered into between the parties. I have not a copy of that contract. I do not remember the date when I first notified Mr. Rader that the wax had been resold, except that it was, of course, subsequent to his originally making the offer and our counter bid and prior to the time when the contract was signed. It was sometime along between then.

Q. Cotton & Company would not have resold the wax unless they had a contract which they considered binding, would they?

A. They considered it binding. It happens every day and as the market was practically at the peak at that time, it looked like a mighty good sale.

(Deposition of A. Percy Leon.)

Q. So then it was not on the reliance of this contract?

A. Yes, absolutely, it was on the reliance of this contract. The contract was not signed, but it was upon the assumption that the contract would be signed that the sales were made.

I have no knowledge myself whether Osmo Oil Refining Co. paid a commission to Rutger Bleecker & Co.

Q. Is it the custom of the trade to consider that an accepted offer to sell binds the party making the offer? In other words, does it make a contract?

A. Well that is a difficult question. It does not make a contract—no—but of course it is understood that provided the parties agree on the conditions of payment and no other modifications are brought up later which might necessitate a [49] change in any other way in the original acceptance, then a sale has been consummated.

Q. Well, after, to adopt your phrase, a sale has been consummated, a seller according to the custom of the trade would not be in a position to repudiate it?

A. Certainly, if the buyer made objections to certain clauses in the contract, and so could the buyer if the seller made objections as to certain clauses or demands. For instance, should Cotton have refused to offer a letter of credit as Ozmo demanded, Ozmo might at their option have considered the sale as not binding or have agreed to ship the goods on sight draft terms as originally offered. It is done every

(Deposition of A. Percy Leon.)

day, for after the parties modify the terms they have to agree as to such modifications.

I had several conversations with Mr. Rader before the details of the transaction for the purchase of the wax was completed. Rutger Bleecker & Co. were brokers who had acted for various other sellers in doing business with us. I do not recall exactly the date on which the contract was modified so that it took its final form. The correspondence may refresh my mind, as it is over two years ago. I do not even recall what month it was in. I remember the transaction strung along August, September and I think October. I am not sure about it, but I think it was that period of the year. I do not recall the date when I informed Ozmo that the wax had been resold. I wrote that letter from Cotton & Company to Ozmo Oil Refining Co. dated October 3, 1918, and signed it.

Q. I read this sentence, "As stated in our wires we are perfectly willing to co-operate with you to the extent of a bank guarantee or a letter of credit for our purchase, but do not [50] understand why this should be necessary as the material has all been resold to responsible houses and particularly in view of the fact that no mention of these terms was made in your contract which we signed." Now, Mr. Leon, that letter, dated October 3d, mentions a contract which Cotton & Co. had signed, was that the original contract?

A. No, as this thing is, as I have already said vague, as I recall it now Ozmo forwarded a contract which they themselves had not signed, making no

(Deposition of A. Percy Leon.)

mention of this letter of credit, and we made minor corrections with reference to the quantity, as I stated before, eliminating the vagueness of the quantity mentioned, and then returned it to them and then received their demand for a letter of credit. When I said the contract had not been signed, I meant they had not signed the contract. Not Cotton & Co. Cotton & Co. did sign that original agreement which was not signed by Ozmo. This original agreement must have been signed by Cotton & Co. previous to October 3, 1918. However, it was cancelled and abrogated by a final agreement which was signed by both parties which embodied new terms and conditions. Our understanding was, in accordance with the custom and manner in which we do business, that the original agreement was never in force. I know the names of the parties to whom the wax was resold. I sold it. Six hundred tons to the Standard Oil Company and 100 tons to Mitsui & Co. Cotton & Co. had written contracts with both of these parties. I have no copies of these contracts. Mr. More may have. I do not recall the dates of the contracts of these purchases. Our negotiations with the Standard Oil Company were with Mr. Salisbury, but whether he or Mr. Cole signed the contract, I am not sure. As to the Mitsui contract, I do not know. To the best of my recollection I signed the contracts on behalf [51] of Cotton & Company, although Mr. Cotton was in New York and may have signed them, but I think I signed both. I do not know what happened after I left Cotton & Company's employ. My

(Deposition of A. Percy Leon.)

understanding was that both these contracts were cancelled. I do not know the dates when they were cancelled.

Q. Do you know anything about the circumstances under which they were cancelled?

A. I know that no wax was delivered during November and December of the two allotments to Mitsui & Co., and I know that no tenders on the contract were made during January and February. After that I do not know what happened, except from hearsay.

Redirect Examination.

The contracts were decidedly not cancelled by mutual consent. When I say they were cancelled, I understood that the Ozmo had tendered some wax which was not up to the contract value, and it was rejected. I notified Rutger Bleecker & Co. within a few days that I had made a resale to the Standard Oil Company and Mitsui & Co.,—within a very short time. That does not help me to refresh my memory as to how soon after the original offer and bid I notified Rutger Bleecker & Co. that I had resold it, except that I know it was within a few days after the contract was closed. By this I mean after the offer had been made and accepted by Rutger Bleecker & Co., and we had made a counter-bid which they accepted—but this was before any written contract was made. I remember the circumstances concerning the sale, for I telegraphed Mitsui people in San Francisco in about the middle of the week offering them 100 tons, and I think it was the next evening that

(Deposition of A. Percy Leon.)

Mr. Cotton and I were in the Hotel Astor when we met Mr. Salisbury of the Standard Oil Company who asked us if we had any wax for sale. I said "Yes, 600 tons," and I gave him an [52] option on it until the following Saturday. I called at his office on Saturday morning and he accepted the 600 tons and in the meantime we had received a wire from Mitsui & Co. accepting the 100 tons. I know that we told Rutger Bleecker & Co. that the wax had been resold. I told them that before any written contracts were entered into. I cannot recall whether I communicated with the Ozmo people directly or in any other way about the resales prior to the execution of any agreement with them. To the best of my recollection there was some delay in receiving the contracts, and as I remember it, I did call Rutger Bleecker and asked them if there was any way to speed up the contracts as the goods had been resold.

Recross-examination.

The Ozmo Oil Refining Company was not a party to the written contracts that Cotton & Co. had with the Standard Oil Company and Mitsui & Company.

The deposition of BENJAMIN RADER was taken on behalf of plaintiff under stipulation, reserving all objections. It is as follows:

Deposition of Benjamin Rader, for Plaintiff.

I live at 1155 Longfellow Avenue, New York City. I am a broker and have been in that business eight years. I am employed by Rutger Bleecker & Co., and have been with them all the time. I know Mr.

(Deposition of Benjamin Rader.)

Leon. I remember in the summer and fall of 1918 that I had communications with Mr. Leon concerning the purchase and sale of this wax in question. I recollect that we did offer Cotton & Company some 500 or 700 tons of wax in the [53] summer or fall of 1918. Whether we had the seller's name at the time we proposed this offer to Cotton and Company, I do not recall. The offer was made to us through our San Francisco office. I learned that we were making an offer of this wax for the Ozmo Oil Refining Company, one of the defendants in this action. Prior to our offering this wax to Cotton & Company they did not request us to procure wax for them. I believe we did offer this wax to other people. Up to the time that we offered the wax to Cotton & Company we were acting presumably for the Ozmo Oil Refining Co., but I do not recall whether I had the seller's name at the time I had the offer in hand. When I called up Cotton & Company I spoke to Mr. Leon who has just testified. My recollection is that Cotton & Company made a bid, a counter-bid on this wax which I offered to them. I communicated that bid to our San Francisco office who handled the transaction there.

Q. Did Mr. Leon, after that, say anything to you about having resold this wax?

A. It was mentioned casually, about what time I cannot say. I know something about the signing of the written contracts. I do not believe they all went through our office, but I cannot say positively.

Q. Do you know whether they notified you that

(Deposition of Benjamin Rader.)

they had resold this wax before you had any written agreements go through your office?

A. No, I cannot recall that.

Q. Did Mr. Leon at one time call you up early after the negotiations were started and express some concern about wanting these contracts signed as Cotton & Co. had resold the wax?

A. I do not know whether it was for that reason that he [54] wanted the contract, but he did urge us to get it through, as there had been some delay. Very likely he told me at that time that the wax had been resold. He did remark that it had been resold, but when he said it is impossible for me to recall.

Q. When you dealt with Cotton & Co. was it a fact that you knew they were not buying it for themselves? A. No, I did not.

We have been in communication with Cotton & Co. before. As far as I know they are jobbers and importers of oils and waxes. I knew that at that time.

Q. Do jobbers and importers usually use this?

A. It all depends, they might have been manufactures also.

I did not know them as manufacturers.

Q. You were satisfied they were buying this to resell and not keeping it to use themselves.

A. I do not know that I ever even gave it a thought. It did not interest us.

Cotton & Company never paid Rutger Bleecker & Co. anything for their services. They were not required.

(Deposition of Benjamin Rader.)

Cross-examination.

The house of Rutger Bleecker & Co. dealt in numerous kinds or products. Its course of business was to find someone who wanted to sell something and someone who wanted to buy something and arrange a sale and have a commission paid by the seller. Sometimes a person or a company may be the buyer, and sometimes the same person or company may be the seller. The firm of Rutger Bleecker & Co. never assumed the responsibility for the solvency of the buyer or *sell*, or ever in any way guaranteed the [55] performance of the contract as brokers. Rutger Bleecker & Co. in buying and selling wax or other products never represented that they represented one party rather than the other, or that they acted on behalf of one party rather than the other. In this transaction no representation was ever made by Rutger Bleecker & Co. that they held this wax as agents of the Ozmo Oil Refining Co. As far as Rutger Bleecker & Co. were concerned, they did not take any interest in whether the wax had been resold by Cotton & Company or not. They did not care what Cotton & Company expected to do with it.

Mr. Smith, of counsel for the plaintiff, then said:

“We now desire to offer certain correspondence in evidence. The object of this correspondence is to show that this contract was made later than October 11, 1918, although it is dated September 5, 1918. There are two letters, and I think they have been offered in evidence—August 29th and August 31st. They have been read.”

The plaintiff then introduced in evidence its exhibits, numbers 1 to 56, inclusive, which are, as follows:

Plaintiff's Exhibit No. 1.

September 17, 1918.

Rutger Bleecker & Co.,
#87 Wall St.,
New York City.

Gentlemen:

We enclose contract in duplicate, covering the purchase, by us, from the Ozmo Refining Company, of 700 tons, 105 to 108 White, semi-refined wax.

We wish to point out that our purchase was for seven hundred (700) tons. We wish this understood in order that we may offer the material for sale without any misunderstanding on the part of our prospective clients. We would also like to have a sample of the wax as soon as possible.

Furthermore, let us point out that you have neglected [56] to state in your contract, the whereabouts of the Ozmo Refining Company. We would like to know this, in order that we may obtain some information regarding the sellers.

Please have the sellers sign and return to us, as soon as possible, one copy of this contract.

Very truly yours,
COTTON & COMPANY, INC.,
Sales Manager.

APL. BS.

Plaintiff's Exhibit No. 2.

Letter-head

RUTGER BLEECKER & CO.

New York.

September 23rd, 1918.

Messrs. Cotton & Co., Inc.

37 Liberty St.,

New York City.

Gentlemen:

Replying to your favor of the 17th. we have changed contract covering your purchase of Paraffine Wax to read 50 tons monthly instead of 35 to 50 tons monthly. As soon as the sellers acceptance comes to hand we will turn the same over to you.

This will also serve to hand you accepted contract of the Arabol Mfg. Co. covering one carload of crude corn oil.

Yours very truly,

RUTGER BLEECKER & COMPANY,

Per B. RADER.

BR/SM.

Plaintiff's Exhibit No. 3.

POSTAL TELEGRAM—TELEGRAM.

Buffalo, N. Y., October 1st, 1918.

Ozmo Oil Refining Company,

San Francisco, Cal.

Arranging with our bank to take up matter of credit with you direct by mail.

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 4.

POSTAL TELEGRAM—TELEGRAM.

11:23 A. M. October 2, 1918. [57]

Ozmo Oil Refining Co.,

Berkeley, Cal.

No reply our wire thirtieth packing Please wire answer immediately Will arrange credit promptly upon receipt signed contract.

COTTON & COMPANY, INC.

Charge.

Plaintiff's Exhibit No. 5.

WESTERN UNION—TELEGRAM.

B41SF ASC 13

San Francisco Calif Oct 3 1918 1104 AM

Cotten and Co

New York N Y

Packing of wax is as offered to Rutger Bleecker in double head barrels

OZMO OIL REFINING CO.

215 PM.

Plaintiff's Exhibit No. 6.

October 3, 1918.

Ozmo Oil Refining Co.,

San Francisco, Cal.

Gentlemen:

We wired you on the 30th ult., as per copy attached, and having received no reply up to yesterday, we again wired you, requesting that you give us an immediate answer.

We are at a loss to understand why you have paid no attention to our telegram and trust that there is some satisfactory explanation, back of your negligence in this matter. As stated in our wires, we are perfectly willing to co-operate with you to the extent of a bank guarantee or a letter of credit for the amount of our purchase but do not understand why this should be necessary as the material has all been resold, to responsible houses and particularly in view of the fact that no mention of these terms was made in your contract which we signed.

However, as stated above, we shall open a letter of credit in your favor promptly upon receipt of your signed contract which you, of course, understand is necessary for us to have before making this arrangement with our bank. In return for this, it is surely not too much for us to ask that you post a guarantee for the performance of the contract in order that we may be secured.

Rutger Bleecker & Co., informed us that you could refer us to the Canadian Bank of Commerce but upon applying to these [58] people, they stated that they had no knowledge of you whatsoever.

Trusting that this affair will soon be cleared up to our mutual advantage, we are,

Yours, for the Fourth Liberty Loan,

COTTON & COMPANY, INC.,

Sales Manager.

APL. BS.

Plaintiff's Exhibit No. 7.

POSTAL TELEGRAPH—TELEGRAM.

October 8, 1918.

Ozmo Oil Refining Co.,
San Francisco, Cal.

Referring your wire Rutger Bleecker have arranged letter credit covering wax purchase which will be opened immediately upon receipt your signed contract These papers necessary complete arrangements with bank.

COTTON & COMPANY, INC.

Charge.

Plaintiff's Exhibit No. 8.

October 8, 1918.

Ozmo Oil Refining Co.,
San Francisco, Cal.

Gentlemen:

We are enclosing herewith a letter covering six hundred (600) tons of Wax, purchased from you, and which has been resold to the Standard Oil Company of New York.

The one hundred (100) tons for shipment, fifty (50) tons monthly, November/December, 1918, has been resold to Messrs. Mitsui & Co., Ltd., of San Francisco.

Please note to mark this one hundred (100) tons as follows:



KOBE

#1 and up.

notifying us in advance by wire when shipment will

be ready to go forward, in order that our buyers may apply for freight permit, and issue instructions.

In accordance with your request, we have arranged with our bank to open a letter of credit, in your favor, covering the entire amount of this contract, which will be done as soon as [59] your signed contract has been received by us. We shall be very glad to have you place before us your further offerings of wax which you may have, and we trust that our instructions, with reference to the shipment of this material will have your careful attention.

Awaiting your acknowledgment of these instructions, we are,

Yours, for the Fourth Liberty Loan,
COTTON & COMPANY, INC.,
Sales Manager.

United States

License

No.

G-08752

Food Administration.

APL: F.

Plaintiff's Exhibit No. 9.

October 8, 1918.

Ozmo Oil Refining Co.,
San Francisco, Cal.

Gentlemen:

With reference to our Purchase Order No. 891, covering the purchase of Matchwax from you, beg to advise that six hundred (600) tons of this material, to be shipped fifty (50) tons monthly, January to De-

cember, 1919, both months inclusive, has been resold to the Standard Oil Company of New York, who will furnish you with shipping instructions through their San Francisco representatives, The Standard Oil Company of California.

Please notify Mr. S. G. Casad, care of the Standard Oil Company of California, Standard Oil Bldg., San Francisco, when the January shipment is ready to go forward and also when each subsequent shipment is ready, in order that he may secure the freight permit, etc. Also please note to send a representatives sample of each shipment to Mr. Casad in order that same may be tested for melting point and oil and moisture content.

We have been advised by our brokers, that "tight double head barrels" means *oil barrels* and it is our understanding that the material will be supplied in this packing. Please note further when making these shipments to supply Mr. Casad in San Francisco with three (3) sets of weight sheets for each shipment and also to forward five (5) copies of the weight sheets to us, attached to railroad bill of lading and draft. We would appreciate it if you could arrange to make shipments earlier, and in larger quantities than specified in the contract, as the buyers are very anxious to secure some of this material.

..Trusting that there will be no difficulty with reference to these matters, and awaiting your acknowl-

edgment of these instructions, we are,

Yours, for the Fourth Liberty Loan,
COTTON & COMPANY, INC.

United States

License

No.

G-08752

Food Administration. [60]

Plaintiff's Exhibit No. 10.

Letter-head

RUTGER BLEECKER & CO.

New York.

October 8th, 1918.

Messrs. Cotton & Co.

37 Liberty St.

New York City.

Gentlemen:

We have a telegram from our San Francisco office dated October 5th, reading as follows.

“Have Ozmos signed contract mailing for signature they say tight barrels mean oil barrels.”

Yours very truly,

RUTGER BLEECKER & COMPANY.

BR/SM.

Per B. RADER.

Plaintiff's Exhibit No. 11.

October 9, 1918.

Rutger Bleecker & Co.,

#87 Wall St.,

New York City.

Gentlemen:

We have yours of the 8th inst., contents of which have had our attention.

We thank you for placing this information before us, and remain,

Yours for the Fourth Liberty Loan,

COTTON & COMPANY, INC.,

Sales Manager.

APL.BS.

Plaintiff's Exhibit No. 12.

Letter-head

OZMO OIL REFINING CO.

San Francisco

October 10, 1918.

Cotton & Company, Inc.,

37 Liberty Street,

New York, N. Y. [61]

Attention Mr. A. P. Leon, Sales Manager.

Dear Sir:

We have received your letter of October 3, for which please accept our thanks.

In reply to same, permit us to state that there is no satisfactory explanation which we can make you, owing to the fact that there has been no negligence on our part in this matter. Beginning with this transaction, permit us to state that, in the ordinary course of business, we offered to Rutger Bleecker & Company, San Francisco

“Subject unsold 50 tons monthly for November, December, and the year 1919, 105 to 108 melting point White Semi-refined Wax packed in double head barrels.”

It is reasonable to suppose that they, in turn, offered you this wax as above. Further, we had

a telegram from Rutger Bleecker & Company, New York, stating that your dear selves were the purchasers of the wax in question. Upon receipt of such information, we forwarded original contracts to Rutger Bleecker & Company for signature. These contracts came back, and, upon arriving in San Francisco, it was discovered that a clause, such as is ordinarily put in all of our contracts, was missing. The clause in question reads as follows: "Irrevocable credit to be established in our favor and subject to our demand every 30 days as wax is being shipped." You will understand please that we, as owners of the wax in question, reserve the right to sell our merchandise in such a manner that would assure us absolute protection against loss of any kind, and we, in turn, will stand ready to protect you, or any other purchaser of our merchandise to the fullest extent. Therefore, we drew up new contracts with the clause inserted as above-mentioned, and have given them to Rutger Bleecker & Company to be forwarded to you for signature. It is not our desire to hinder you in any way, being that we stand ready at all times to co-operate with you in every way and manner possible.

The wax in question, as offered to Rutger Bleecker & Company, is packed in double-head barrels, which to the wax trade, means oil or glucose barrels with six or eight iron hoops. For your own information, we beg to state that we put double heads in all of our wax barrels as a protection against moisture. As to the material these barrels are made of, we can give you no definite informa-

tion. Some barrels will be fir; some, oak; and some, soft wood. Barrels are difficult to procure at the present time; nevertheless, you will receive as good a barrel from us as wax was ever shipped in by any other company.

Our reference and bank is the Canadian Bank of Commerce, located in San Francisco, California, and not in New York as you have been led to believe.

We wish to thank you for your kindness, and hope that we have cleared up any and all points which have not been clear [62] to you. It is our aim to co-operate with you, and we trust that this transaction will only be the beginning of pleasant relations with your firm, and that in the future we will be able to receive your valued business to our mutual advantage.

Yours for winning the war,

OZMO OIL REFINING COMPANY.

By N. R. WEST,

NRW-C.

Sales Manager.

Plaintiff's Exhibit No. 13.

WESTERN UNION—TELEGRAM.

Buffalo, N. Y., October 11th, 1918.

DAY LETTER.

Ozmo Oil Refining Company,

San Francisco, Cal.

We have been trying for several days to get advice from you as to where signed contracts are as these documents necessary in completing letter of credit Arrangements all made for this credit

and we are waiting receipt of documents Have authorized you insert letter of credit terms on contract Please advise by wire when documents were mailed and whether to New York or Buffalo Answer Buffalo

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 14.

October 11, 1918.

Rutger Bleecker & Co.,
#79 Wall St.,
New York City.

Dear Sir:

Attention Mr. Rader.

We beg to acknowledge receipt of contract, in duplicate, covering our purchase, through you from the Ozmo Oil Refining Co., of San Francisco, Cal., of:—

700 tons, Matchwax.

We are returning herewith, duly accepted copy of this contract, which we have corrected, as you will note. Inasmuch as our correspondence, relative to this transaction, was in reference to 700 tons, and as our resales have been based on this quantity, [63] we feel that we are entitled to delivery, in full.

We have also added the clause "oil barrels, suitable for Export," in accordance with your telegraphic confirmation.

Trusting that there will be no further hitch in regard to this matter, and assuring you that letter

of credit will be opened immediately, upon receipt of this contract, by our Buffalo Office, we are,

Yours, for the Fourth Liberty Loan,

COTTON & COMPANY, INC.,

APL.BS.

Sales Manager.

Plaintiff's Exhibit No. 15.

WESTERN UNION—TELEGRAM.

1918 Oct 11 PM 3 55

B176CH 10

San Francisco Calif 1217 P 11

Cotton and Co

Buffalo N Y

Wax contracts delivered to Rutger Bleecker Co.
five days ago.

OZMO OIL REFINING CO.

Plaintiff's Exhibit No. 16.

October 12, 1918.

Ozmo Oil Refining Co.,

San Francisco, Cal.

Gentlemen:

We enclose confirmation of lay letter sent you yesterday, as follows:

“We have been trying for several days to get advice from you as to where signed contracts are as these documents necessary in completing letter of credit arrangements all made for this credit and we are awaiting receipt of documents have authorized you insert letter of credit terms on contract please advise us by wire when documents were mailed and whether to New York or Buffalo answer Buffalo”

to which we received your reply as follows: [64]

“Wax contracts to Rutger Bleecker Co five days ago.”

However, we have since received the contract from these people, and the matter will now have our attention.

Thanking you, we are

Very truly yours,

COTTON & COMPANY, INC.

MBF/O.

Per _____

Encls.

Plaintiff's Exhibit No. 17.

POSTAL TELEGRAPH—TELEGRAM.

NIGHT LETTER.

New York, N. Y. Nov. 19, 1918.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Ship fifty tons matchwax our contract to order Cotton and Company Inc Notify Mitsui and Company Ltd San Francisco under domestic b lading drawing on us through Buffalo Trust Company If possible arrange hold cars your switch in order avoid demurage Essential shipment move this month Please acknowledge.

COTTON & COMPANY, INC.

Charge.

Plaintiff's Exhibit No. 18.

WESTERN UNION—TELEGRAM.

1918 Nov 21 PM 2 03

C347 KS 15

San Francisco Calif 1035A 21

Cotton & Co Inc

New York N Y

Your telegram November nineteenth received
Will comply with your instructions Will notify
you of shipment.

OZMO OIL REFINING CO. [65]

Plaintiff's Exhibit No. 19.

November 22, 1918.

Ozmo Oil Refining Company,

433 California St.

San Francisco, Cal.

Gentlemen:

We are in receipt of your wire of yesterday, as follows:

“Your telegram nineteenth received Will
comply with your instructions Will notify you
of shipment.”

and beg to thank you for your prompt acknowledgment of our telegraphic instructions, with reference to the shipment of our November allotment of Wax.

Trusting there will be no hitch in handling this material, we are

Yours very truly,
COTTON & COMPANY, INC.,
Sales Manager.

APL-EV.

Plaintiff's Exhibit No. 20.

POSTAL TELEGRAPH—TELEGRAM.

Buffalo, N. Y., November 29th, 1918.

Ozmo Oil Refining Company,
433 California St.

San Francisco, Cal.

Be sure get documents on Match Wax started promptly Must have November bill lading attached draft Wire if documents gone forward

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 21.

November 29th, 1918.

Ozmo Oil Refining Co.,
San Francisco, Cal.

Gentlemen:

We wired you to-day as per copy of telegram attached, [66] asking that you be sure and get the Match Wax started promptly and furnish us a November bill of lading on same.

We trust that this matter has already had your

attention, as our customer is getting somewhat anxious.

Very truly yours
COTTON & COMPANY, INC.,
Secretary.

FMS/F.

Encls.

Plaintiff's Exhibit No. 22.

WESTERN UNION—TELEGRAM.

B140SFAHJ 60 Blue

San Fran Cal 245 P Nov 30 18

Cotton and Co

39 Liberty St

New York

Our refinery advises that it will be physical impossibility to ship wax to you this month Stop Will ship last of December amount due you that month but can't ship November order before early months next year Stop This due to condition beyond our control caused by troubles common to and arising from war influenza Stop We are indeed sorry.

OZMO OIL REFINING CO.

412 P.

Plaintiff's Exhibit No. 23.

POSTAL TELEGRAPH—TELEGRAM.

NIGHT LETTER.

Dec. 2, 1918.

Ozmo Oil Refining Company,

433 California St.

San Francisco, Cal.

Replying Day Letter your notification delay No-

vember shipment did not reach us until this morning Consider this failure notify us earlier inexcusable Our buyers threaten take action against us Stop On what basis will you settle in order enable avoid loss Stop Your telegram twenty-first acknowledging receipt definite shipping instructions and stating specifically your intention to comply with same regarded inexplicable Answer.

COTTON & COMPANY, INC.

Charge. [67]

Plaintiff's Exhibit No. 24.

POSTAL TELEGRAPH—TELEGRAM.

New York, N. Y. Dec. 5, 1918.

NIGHT LETTER.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

No reply wire second Unless we receive satisfactory answer within forty-eight hours must proceed against you to recover our loss

COTTON & COMPANY, INC.

Charge.

Plaintiff's Exhibit No. 25.

WESTERN UNION—TELEGRAM.

1918 Dec 7 PM 5 50

416 KS 49

San Francisco Calif 138 P 7

Cotton and Co

39 Liberty St

New York N Y

Your telegram fifth received referring to Novem-

ber war shipment beg to advise that we are advised shipment will be made from the refinery on or before December twenty-third Delay in making this shipment being due to strike at refinery influenza and government regulations as to crude oil supplies.

OZMO OIL RFG CO.

Plaintiff's Exhibit No. 26.

December 7th, 1918.

Ozmo Oil Refining Co.,
433 California St.
San Francisco, Cal.

Gentlemen:

We wire you on the 2nd instant, in reply to your night letter of the 30th ultimo, as per copy attached. Having heard nothing from you, up to the 5th instant, we again wired you, as per second copy attached.

We are certainly surprised at the attitude you are taking [68] with regard to this matter, and feel that you should have notified us, in advance of your inability to ship during the Month of November, in order that we might have had an opportunity to cover our requirements elsewhere.

Our clients absolutely refuse to listen to any such excuses as you give, and we are therefore forced to sustain a heavy loss.

Trusting that we shall hear from you promptly, with a satisfactory explanation of the occurrence,

and an offer to adjust the matter, on a reasonable basis, we are

Yours very truly,
COTTON & COMPANY, INC.,
Sales Manager.

APL-EV.

Plaintiff's Exhibit No. 27.

December 9th, 1918.

Ozmo Oil Refining Co.,
433 California St.
San Francisco, Cal.

Gentlemen:

We beg to acknowledge receipt of your wire of Saturday as follows:

“Your telegram fifth received referring to November wax shipment beg to advise that we are advised shipment will be made from the refinery on or before December twenty-third delay in making this shipment being due to strike at refinery Influenza and government regulations as to crude oil supplies.”

We immediately wired you to-day, as per copy attached, and must confirm same to the effect that your explanation of the delay of the November shipment, certainly does not excuse your failure to notify us of said delay prior to the expiration of the month, and that we must therefore hold you responsible for our loss.

We have instructed our Buffalo office to bill you for the amount of the loss, and trust that we may receive a check for the amount in question, promptly, upon your receipt of our invoice.

While we regret being compelled to take this firm stand in the matter, we feel that it is entirely your fault, as you should have notified us prior to the expiration of the month, and we could undoubtedly have come to some arrangement with our [69] buyers, or in the event of our failure to do so, we could have covered in the market elsewhere.

We also confirm our instructions to you to ship the December allotment, to the order of Cotton & Co., Inc., notify Messrs. Mitsui & Co., Ltd., San Francisco, Cal., shipping on a domestic bill of lading, and showing Cotton & Co. as shippers.

Please acknowledge receipt of these instructions, see to it that shipment is made before the expiration of this month, notifying us promptly, when you make shipment.

Trusting that there will be no difficulty regarding any of the other shipments on this contract, and awaiting your further favors, we are

Yours very truly,
COTTON & COMPANY, INC.,
Sales Manager.

APL-EV.

Plaintiff's Exhibit No. 28.

POSTAL TELEGRAPH—TELEGRAM.

DAY LETTER.

New York, N. Y. Dec. 9, 1918.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Your explanation delay November shipment wax

does not excuse failure to notify us prior to expiration of month Must hold you responsible our loss Stop Ship December allotment domestic bill lading order Cotton Company Notify Mitsui and Company San Francisco Please acknowledge.

COTTON & COMPANY, INC.

Charge.

Plaintiff's Exhibit No. 29.

WESTERN UNION—TELEGRAM.

C378KS 17

1918 Dec 9 PM 5 52

San Francisco Calif 233 P 9

Cotton and Co

New York N Y

Acknowledging your telegram December ninth pertaining December wax kindly give us shipping instructions for November wax Answer kindly give us shipping instructions for November wax Answer

OZMO OIL REFG CO. [70]

Plaintiff's Exhibit No. 39.

POSTAL TELEGRAPH—TELEGRAM.

NIGHT LETTER.

Dec. 11, 1918.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Your telegram ninth November wax matter has been referred our Mr Cotton who is now at Buffalo office and will communicate with you direct from

there Stop Imperative December allotment be shipped promptly.

COTTON & COMPANY, INC.

Charge Cotton.

Plaintiff's Exhibit No. 31.

December 11th, 1918.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Gentlemen:

We beg to acknowledge receipt of your wire of the 9th instant, as follows:

“Acknowledging your telegram December ninth pertaining December wax Kindly give us shipping instructions for November wax answer.”

to which we replied to-day as per copy attached.

From this, you will understand that we have referred this matter to our Mr. Cotton, who is now at our Buffalo office, and who will communicate with you direct from there.

We feel that your explanation for the delay is quite inexcusable, and furthermore, your failure to notify us of your inability to ship, renders you absolutely responsible for any loss which we may sustain.

Trusting that you will comply with our instructions with reference to the December allotment, and impressing upon you the necessity of making this

shipment during the current month, we are

Yours very truly,
COTTON & COMPANY, INC.,
Sales Manager.

APL-EV. [71]

Plaintiff's Exhibit No. 32.

POSTAL TELEGRAPH—TELEGRAM.

Buffalo, N. Y., December 17th, 1918.

NIGHT LETTER.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Arrange to ship Mitsui December Match Wax promptly advising us by wire about when same will go forward Follow instructions given for November shipment in regard to holding cars on your switch as long as possible after documents are mailed to Buffalo Writing you in detail regarding November consignment Delay in shipping November lot will require your co-operation to work out Letter explains.

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 33.

December 19th, 1918.

Ozmo Oil Refining Co.,
433 California St.
San Francisco, Cal.

Gentlemen:

With reference to January, 1919, allotment Wax,
please arrange to have the barrels marked

◇(c) 1/up

also the clause "goods manufactured in the U. S. A." must appear on all packages. Kindly send all records through in duplicate.

Our New York office wrote you on October 8th with reference to the manner in which we desired these shipments to be made and we trust that you will comply with such instructions.

We are hoping to hear from you that our December consignment has been shipped and the papers forwarded to Buffalo.

Very truly yours,
COTTON & COMPANY, INC.,
Secretary.

FMS/F. [72]

Plaintiff's Exhibit No. 34.

WESTERN UNION—TELEGRAM.

B 193CH 21

1918 Dec 19 PM 2 52

San Francisco Calif 1057 A 19

Cotton and Co

Marine Natl Bank Bldg

Buffalo N Y

Your wire seventeenth wax will leave Refinery about December twenty-eight January Shipment will be made between January twentieth and thirtieth.

OZMO OIL REF CO.

Plaintiff's Exhibit No. 35.

POSTAL TELEGRAPH—TELEGRAM.

Buffalo, N. Y., December 28th, 1918.

Ozmo Oil Refining Company,

433 California St.

San Francisco, Cal.

Be sure to have December bill of lading covering December shipment Wire us date draft is sent

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 36.

POSTAL TELEGRAPH—TELEGRAM.

Buffalo, N. Y., January 6th, 1918.

NIGHT LETTER.

Ozmo Oil Refining Company,

433 California St.

San Francisco, Cal.

Advise by wire when documents covering De-

December shipment Match Wax on our contract were forwarded Also advise present location of cars

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 37.

WESTERN UNION—TELEGRAM.

[73]

C120CH 73

1919 Jan 7 PM 6 38

San Francisco Calif 240 P 7

Cotton and Co

Marine Natl Bank Bldg

Buffalo NY

December shipment wax not up to specifications
Color dark yellow Stop This particular wax is
being supplied by Utah Refining Company Salt
Lake thru their agent Continental Petroleum Com-
pany San Francisco Stop On account wax not up
to specifications we naturally refused accept deliv-
ery Stop Please consider us as acting in good
faith for your interests and would appreciate your
advising your disposition so that we may protect
your interests as well as our own.

OZMO OIL REFINING CO.

Plaintiff's Exhibit No. 38.

POSTAL TELEGRAPH—TELEGRAM.

NIGHT LETTER.

Buffalo N. Y., January 9, 1919.

Ozmo Oil Refining Company,

433 California Street,

San Francisco, Cal.

Yours seventh suggest you take necessary legal

steps protect your interests Wire status balance of shipments for this year advising actual shipment and possibilities of fulfillment Upon receipt this information we will write you fully our suggestions.

COTTON & COMPANY, Inc.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 39.

WESTERN UNION—TELEGRAM.

A767NY 50 BLUE 1919 Jan 13 PM 11 58

San Francisco Calif 512 P. 13

Cotton and Co.

Marine National Bank Bldg

Buffalo NY

Yours ninth referring to ours seventh Continental Petroleum advise that they can furnish sixty tons wax as per contract and specifications to apply on December order of agreeable to you Furthermore they will endeavor to procure forty tons additional to clean up nineteen eighteen account Stop Wire us your disposition.

OZMO OIL. [74]

Plaintiff's Exhibit No. 40.

WESTERN UNION—TELEGRAM.

All8NY 61 4 EX NL 1919 Jan 14 AM 3 11

San Francisco Calif 13

Cotton and Co.

Marine National Bank Bldg

Buffalo NY

Yours ninth wax nineteenth nineteen to be supplied by the same refiners brought same channels as per

our telegram seventh Stop We have advices from Continental on behalf Utah Refining quote By February fifteenth we will be prepared to ship you the white wax as per contract specifications unquote We are awaiting your suggestion and will act accordingly.

E. SWIFT TRAIN,
Vice-Pres. Ozmo Oil.

Plaintiff's Exhibit No. 41.

WESTERN UNION—TELEGRAM.

T103BU FES 24

San Francisco Calif 1229 PM Jany 16 19

Cotton and Co

M B Buffalo

No reply our wire Jany thirteenth received Stop Would greatly appreciate your advices in answer our day letter relative to cleaning up nineteen eighteen account

OZMO OIL REFG CO.
407 P.

Plaintiff's Exhibit No. 42.

POSTAL TELEGRAPH—TELEGRAM.

NIGHT LETTER.

Buffalo, N. Y., January 17th, 1919.

Ozmo Oil Refining Company,

433 California Street,

San Francisco, Cal.

Your failure to notify us of your inability to ship November December lots white match wax has put us in position of being unable to force Mitsui to

take late delivery Therefore feel we should look to you for protection as we were unable to buy in open market to cover on account of this delay Accordingly do not see how we can accept shipment either now or at later date to cover that part of contract Stop Regarding January June shipments Standard Oil advise that they will be compelled to cancel any portions of contract unfilled according to specifications or late delivery Therefore feel we should buy January allotment in open market [75] billing you for difference you in turn doing same to your suppliers Anxious to co-operate every way possible as we feel confident we can do much future business with you Advise your disposition Stop Later developments make We think there is bare possibility of forcing delivery on Mitsui in spite of delay and have wired them along these lines with the idea of saving you the trouble of collecting loss from your suppliers This uncertain but doing our best

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 43.

WESTERN UNION—TELEGRAM.

A 619 NY 112 4 EX NL Jan 20 PM 10 25

San Francisco Calif 20

Cotton & Co

Marine National Bank Building

Buffalo NY

Referring your telegram January seventeenth please accept our appreciation of your full and com-

plete advices Stop We are submitting as per your letter dated New York City October eighth samples Standard Oil Co California also samples Curtis and Tompkins chemists accounts January shipment Stop Will notify you by telegraph relative chemists analysis and should this wax be as per specifications we will accept same from Continental to apply on January allotment Stop We are looking forward to your advices relative Mitsuis acceptance delayed deliveries and feel confident you will be successful in making mutual satisfactory arrangements Stop Writer is and will be giving personal attention to completion of this contract.

E. SWIFT TRAIN,
Vice-Prest. Ozmo Oil.

Plaintiff's Exhibit No. 44.

WESTERN UNION—TELEGRAM.

A643CH 64 NL

1919 Jan 22 PM 11 15

San Francisco Calif 22

Cotton and Co

Marine National Bank Bldg

Buffalo NY

Sixty tons wax offered us by Continental to apply January allotment Curtis and Tomkins Complete analysis shows melting point one hundred eight and half color light yellow moisture eight one hundredths per cent Stop Standard Oil California analysis shows melting point one hundred seven sixth tenths color light yellow Stop We understand Standard California wired Standard New

York for instructions Please advise us your disposition.

OZMO OIL REFINING CO. [76]

Plaintiff's Exhibit No. 45.

WESTERN UNION—TELEGRAM.

C 463NY 91/74

1919 Jan 30 P M 5 59

San Francisco Calif 1225 P. 30

Cotton and Co

Marine Natl Bank Bldg

Buffalo NY

We are advised that the Utah Oil Refining Company can positively ship before January thirty first thirty tons of white match wax of the specifications covered by our contract and that before February tenth they can ship in additional thirty tons and before February twenty fifth an additional thirty tons of the same material Stop They also advise that commencing March first they can and will make regular monthly shipments of this wax Stop This wax will be moving as per above and as usual we wish to keep you advised

OZMO OIL REFG CO.

Plaintiff's Exhibit No. 46.

POSTAL TELEGRAPH—TELEGRAM.

NIGHT LETTER.

Buffalo, N. Y., January 31st, 1919.

Ozmo Oil Refining Company,

433 California St.,

San Francisco, Cal.

Standard Oil refuse take delivery unless quantity

and specifications according contract Therefore suggest you have suppliers hold first thirty tons until entire fifty tons is ready on February consignment meantime protecting yourselves legally against failure in January delivery Trust February and forward will be delivered according contract Stop Ask Utah mail us pound sample Stop Appreciate your cooperation.

COTTON & COMPANY, INC.

Charge

Plaintiff's Exhibit No. 47.

WESTERN UNION—TELEGRAM.

X122 CH 58

1919 Feb 5 PM 4 14

San Francisco Calif 1048 A T

Cotton & Co

Marine Natl Bank Bldg

Buffalo NY

Referring our telegram January Thirtieth your Wire January Thirty first Utah wax sample has been forwarded. Stop Sample submitted Standard Oil here tests white melting point one hundred eighteen [77] one half oil and moisture two decimal forty seven per cent Stop Utah have thirty tons loaded can furnish balance as per our wire January Thirtieth Your immediate reply necessary.

OZMO OIL REF CO.

Plaintiff's Exhibit No. 48.

WESTERN UNION—TELEGRAM.

B545 NY 38 BLUE 1919 Feb 7 PM 7 39

San Francisco Cal 410 P 7

Cotton and Co

Marine National Bank Bldg

Buffalo NY

Referring our telegram Feb'y fifth have had no reply Stop Utah Refinery advise through Continental if wax tendered as per our wire January Thirtieth is not accepted immediately they must dispose of same elsewhere wire us straight message.

OZMO OIL REFINING CO.

Plaintiff's Exhibit No. 49.

WESTERN UNION—TELEGRAM.

A340CH 44 NL 1919 Feb 8 PM 3 38

San Francisco Calif 8

Cotton & Co

Marine Natl Bank Bldg

Buffalo NY

Ours eighth Curtis Tompkins analysis wax color white melting point one hundred twenty American method one hundred seventeen foreign method Stop Can you point out advantage to your buyer of superior quality than one hundred five to one hundred eight at same price Answer.

OZMO OIL REF CO.

Plaintiff's Exhibit No. 50.

POSTAL TELEGRAPH—TELEGRAM.

Buffalo, N. Y., February 8th, 1919.

Ozmo Oil Refining Co,
433 California Street,
San Francisco, Cal.

Yours of the seventh. Our buyer will take delivery of fifty tons in February but insist it must be for fifty tons according to terms of contract and specifications must be according contract. If first thirty tons mentioned yours of the fifth is within specifications and additional twenty tons can be gotten forward so that fully fifty [78] tons can be delivered within the contract period our buyer of course will accept Be sure all terms and conditions contract and letter of credit fully complied with.

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 51.

February 8, 1919.

Ozmo Oil Refining Company,
433 California Street,
San Francisco, Cal.

Gentlemen:—

We enclose confirmation of our telegram of to-day, regarding shipment of February portion of our contract for Match Wax. The Standard Oil Company have made it very plain to us that they will take delivery but only in absolute accordance with the terms of the contract.

We trust you will appreciate our endeavor to co-

operate with you in every way and realize that we are only protecting you as well as ourselves against taking any shipment that is not in every way satisfactory to them.

We are very anxious to work with you in every way in this matter as well as on lubricating oils. The samples you sent us have been put into the hands of our salesmen and we expect to pass you some orders for lubricating oils shortly.

We might say right here that we are issuing an export catalogue and if you would like to have us do so we would be glad to put in a photograph of your plant, as one of our sources of supply for lubricating oils and waxes.

We are enclosing herewith our invoice, which explains itself, and beg to advise that we are drawing on you at sight for the amount. The difference represents the average market price of Match Wax of the quality called for by our contract during November, December and January. We had no notice whatever of your inability to deliver December and January portions, and in connection with the November shipment, the notice of your failure to deliver was not received until the 2nd of December, so we think you will agree with us that this was not sufficient notice to allow us to protect ourselves, and we must therefore look to you and your supplier should in turn protect you. We trust you will honor our draft upon presentation, and believe us,

Yours very truly,

COTTON & COMPANY, INC.,

President.

Plaintiff's Exhibit No. 52.

POSTAL TELEGRAPH—TELEGRAM.
NIGHT LETTER.

Buffalo, N. Y., February 17th, 1919.

Ozmo Oil Refining Co.,
433 California Street,
San Francisco, Cal.

Yours thirteenth or seventeenth just received
Have Mr. Howard advise our Buffalo office by wire
date he will be in New York We will arrange have
Mr. Cotton meet him at our New York office Glad
to co-operate with him but our contract is with you
and we look to you for protection of our losses.

COTTON & COMPANY, INC.

Charge.

Plaintiff's Exhibit No. 53.

POSTAL TELEGRAPH—TELEGRAM.

Back Date Feb 17 2 pm

San Francisco, Calif Feb 13th 1919

BNY 20 Sx 141 N. L

GX

Cottom and Co

Marine National Bank Bldg.,
Buffalo, N. Y.

Your letter eighth Howard president Utah Oil
Rfg here going into matter thoroughly and advise
that when contract was closed his company obtained
its crude from grass creek Wyo and this crude
produced wax per specifications but that in October
his crude was arbitrarily changed to another

Wyoming crude which required special treatment before satisfactory wax could be made stop that this equipment is now installed and that they are in a position to make delivery according to contract stop that the failure in making shipments was caused by conditions over which the Utah oil had no control and therefore under the damage clause of the contract they claim immunity stop however Mr. Howard is going to New York later part of next week and hopes to be able to see your representative and standard oil people and make some satisfactory arrangements.

OSMO OIL RFG. CO.

Plaintiff's Exhibit No. 54.

Buffalo, N. Y., April 10th, 1919.

Ozmo Oil Refining Co.,
433 California Street,
San Francisco, Cal.

Gentlemen:—

The writer had the pleasure of a visit with Mr. Howard [80] of the Utah Oil Refining Company last month, but as far as I could find out he had no solution to offer in regard to the Match Wax for the balance of the year. It seems that it will be impossible for them to produce a match wax of the quality required in time to be of any use to us on this contract.

He did suggest to me however that you might be willing to cancel the balance of the contract in order to clean the matter up. We feel in this connection however, that we have acted in good faith in the

matter and have opened a letter of credit in your favor which we have been compelled to pay for, as the position that the bank takes is that they have held the money there for our use and are therefore entitled to their compensation, which of course is true.

We feel that in view of the fact that you have never fulfilled any part of the contract that we are entitled to compensation for our loss based on the market price of wax on the dates that you contracted to make delivery. We have invoiced you for part of this, namely the November, December and January lots and are enclosing our invoice for \$1217.50 for the February lot. The March portion on this contract is undelivered, and there is, of course, no evidence that any effort will be made on the part of your suppliers to finish out their contract.

We therefore insist that we are entitled to compensation, in accordance with the invoices previously rendered, and the one enclosed, and shall expect immediate settlement of this account.

Unless settlement is forthcoming to us, we shall be compelled to collect the claim in spite of our desire to avoid any unpleasantness between your good selves and our firm.

You will recall that we were never notified of your inability to deliver, except on one lot, and this notification was not sent until the last day of the month, too late for us to act in any way to protect ourselves.

We feel that we have shown our good faith, and that a settlement on your part is now in order.

Yours very truly,

COTTON & COMPANY, INC.,

President.

CHC/EV.

Plaintiff's Exhibit No. 55.

Letter-head

OZMO OIL REFINING CO.

San Francisco.

April 25, 1919.

Messrs. Cotton & Company,

Marine National Bank Building,

Buffalo, New York. [81]

Gentlemen:

Answering your letter of April 10th. We cannot see our way clear to cancel the balance of the contract. Considering the present wax market, you must realize that we could hardly agree to cancel the contract and pay you any compensation.

We are willing to cancel the whole contract and would like to have your views upon this subject.

Very truly yours,

OZMO OIL REFINING COMPANY.

E. SWIFT TRAIN,

Vice-president.

EST—C

Plaintiff's Exhibit No. 56.

MITSUI & CO., LTD.

CONTRACT MEMORANDUM

San Francisco, Cal. October 1st, 1918.

Cotton and Company,

37 Liberty St.,

New York City, N. Y.

Gentlemen:

With reference to our telegram of September 28th, and yours of September 30, we beg to confirm our purchase from you for one hundred (100) short tons Match Wax, on the following terms and conditions:

Quantity:—One hundred (100) short tons net weight in all.

Quality: —White Match Wax, one hundred five to one hundred eight (105–108) MP.

Shipment:—To be made during November and December 1918, fifty (50) short tons each, shipping instructions will follow later.

Price: —At ten and one half cents ($10\frac{1}{2}\text{¢}$) in U. S. Currency per pound net weight, f. o. b. San Francisco, California.

Packing: —To be packed in double head barrels suitable for export.

Payment:—Draft to be drawn on sight on us accompanied by the shipping document.

Shipping Mark:—



KOBE [82]

1/

This memorandum is made out in duplicate, so if

the same is found by you correct and satisfactory you will kindly return to us, at your earliest convenience, either copy duly signed and approved by your good-selves.

Very truly,
MITSUI & CO., LTD.,
(Signed) Y. NAGASHIMA,
Manager.

Approved and Accepted:
For COTTON & COMPANY, INC.,
(Signed) _____

It was stipulated that the letter marked "Plaintiff's Exhibit 6" and dated October 3, 1918, was received by the Ozmo Oil Refining Co. on October 14th, and that Plaintiff's Exhibit 8, being a letter dated October 8, 1918, was received by the Ozmo Oil Refining Co. on October 14. It was also stipulated that the contract between Messrs. Cotton & Company and Mitsui & Company was executed and delivered on or about October 7th, and that it further appeared that there was some telegraphic offer and acceptance between those two parties prior to that date, to wit, on September 28th and September 30th.

The defendant then introduced in evidence its Exhibits "H," "I," "J," and "K." They are as follows:

Defendant's Exhibit "H."

August 21, 1918.

Messrs. Bleecker, Rutger & Co.,
24 California Street,
San Francisco, Calif.

Gentlemen:

We offer, subject unsold, 50 tons monthly for delivery [83] November, December and year 1919, 105 to 108 melting point, yellow crude scale wax at 9¢ per pound, San Francisco; 105 to 108 white semi-refined wax at 9½¢, San Francisco. The above all packed in double head barrels.

We also offer, subject unsold, September, October, November, and December deliveries, 50 tons monthly, 124 to 126 melting point, white semi-refined wax at 11½¢ per pound wooden barrels f. o. b. San Francisco, in car lots. If interested in the above, advise quickly.

Yours very truly,
OZMO OIL REFINING COMPANY.

By _____,

NRW—C

Sales Manager

Defendant's Exhibit "I."

WESTERN UNION—TELEGRAM.

B129SF ZN 6

RS New York NY 507P Aug 29 1918
Rutger Bleecker and Co.

San Francisco Calif
Buyer Wax Cotton and Co Buffalo

RUTGER BLEECKER CO.
312P.

Defendant's Exhibit "J."

Letter-head

RUTGER BLEECKER & CO.

San Francisco

August 31st, 1918

Ozmo Oil Refining Co.,
433-California Street,
San Francisco, Calif.

Gentlemen:

This will serve as a confirmation of the sale made for your account to Messrs. Cotton & Co., Buffalo, New York, covering the following Wax:

700-tons White Semi-Refined Wax 105 to 108
melting point, tight barrels at 9-1/4¢ f. o. b.
San Francisco. [84]

Shipment to be made 50-tons monthly for November December, and the year 1919—
Brokerage to us 1%.

We are now awaiting your contracts, which we will immediately forward to the buyers for their signature, which we will return for your files.

Yours very truly,

RUTGER BLEECKER & CO.,

By HARVEY L. LAUGHLIN.

L -JW.

Defendant's Exhibit "K."

MEMORANDUM.

COTTON & COMPANY *vs.* OZMO OIL REFIN-
ING COMPANY.

The market price of white semi-refined wax, 105 to 108 melting point, f. o. b. San Francisco, was as follows:

1918.

October	81½—9
November	81½—9
December	81½—9

1919.

January	81½—9
February	81½—9
March	81½—9
April	71½—8
May	5 —5½
June	5 —5¼
July	41½—5
August	41½—5
September	4¾—5
October	5 —5½
November	5½—6
December	5½—6 [85]

It was stipulated that Defendant's Exhibit K was a correct schedule of the market price of white semi-refined wax 105 to 108 melting point, f. o. b. San Francisco.

The case was then closed, and after argument the Court said:

The COURT.—I am satisfied in this case that the contract, as counted upon, was finally executed as of the date that is alleged, and that the evidence brings this case fairly within the rule of the special damages counted upon. Of course, the rule is not uniform in its application, as counsel has shown; some courts rule with a greater strictness and others with greater leniency; but the rule in this country, I think is rather more liberal than the English rule, and, in fact, I think the modern rule is more liberal than as stated by Sutherland. If it is fairly brought to the attention of the seller, the party contracting to sell, that the goods contracted for have been resold, or the circumstances are such as to advertise to him, as is shown in a number of these cases, without special notice, that that, necessarily, is the purpose of the purchase, he is liable for the damages that the party has suffered by reason of the circumstances growing out of the transaction—and that is the value that the party would have received or the price that the party would have received upon the resale.

As far as the other point is concerned, I really do not think there is anything of substance in it. The evidence of Leon is sufficient in itself. While somewhat vague as to the exact date, it is sufficient in itself to show that the defendant, here, had notice a very considerable time before the contract was finally executed that the goods had already been resold. [86] It was not material that he should have been able or should have stated to them at that time the precise date on which they had been resold, or that he should have been able to put the finger of his mind

upon it when he was testifying. He did fix it very definitely as subsequent to the time the broker's proposition was accepted, but some time before the final execution of the contract.

As to the first point, I have sufficiently indicated my view on that, that the contract did not become a contract under the very contemplation of the parties until it was finally put in such form as that the minds of the parties met upon it, and that that was evidenced by their respective signatures.

Would counsel on either side like to have findings? We do not give findings in this court unless they are demanded really before judgment, but I very rarely refuse them on that ground.

Mr. LANAGAN.—I would like to have findings.

The COURT.—Very well. You may draft findings, Mr. Smith, and submit them to Mr. Lanagan, and if you have any amendments you wish to submit, Mr. Lanagan, you may do so; if you cannot agree on them I will settle them.

Judgment, then, may be entered upon the findings. As I gather it, there is no particular question between you as to what the amount of the recovery will be, under the rule I have indicated, the difference between the contract with the defendant and the price for which the goods were to be resold to the Standard Oil Company and to Mitsui & Co.

The Court then made and filed its decision embracing [87] findings of facts and conclusions of law, in words and figures following, to wit:

(Title of Court and Cause.)

Decision Embracing Findings of Fact and Conclusions of Law.

This case coming on regularly for trial on the 4th day of May, 1921, before this court sitting without a jury, a jury having been expressly waived by written stipulation filed herein, Willard P. Smith, Esq., and Walton C. Webb, Esq., appearing as attorneys for Cotton and Company, Inc., the plaintiff, and James Lanagan appearing as counsel and Thomas Beedy and Lanagan, as attorneys for the defendants, Ozmo Oil Refining Company and Petroleum Products Company, and evidence oral and documentary having been offered upon each and all of the allegations and issued in said action, and the same cause having been thereupon submitted to the Court for its consideration and decision and the Court having fully considered all the matters both of law and fact submitted to it, and being fully advised in the premises, now makes and renders its decision herein embracing its findings of fact and conclusions of law as follows, to wit:

FINDINGS OF FACT.

The Court finds as follows:

I.

That plaintiff now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business at the City and County and State of New York, and that it was

by virtue of its incorporation a citizen of the State of New York. [88]

II.

That the defendant, Ozmo Oil Refining Company, was at all times herein mentioned and is now a corporation duly organized and existing under and by virtue of the laws of the State of California and that it was and is a citizen of the said State of California, with its principal office at the City and County of San Francisco, in said state.

III.

That the defendant, Petroleum Products Company, was at all times herein mentioned and is now a corporation duly organized and existing under and by virtue of the laws of the State of California and that it was and is a citizen of said state, with its principal office at the City and County of San Francisco, in said state.

IV.

That on the 14th day of October, 1918, plaintiff and defendant, Ozmo Oil Refining Company, entered into an agreement in writing reading as follows:

“This agreement, made and entered into this fifth (5th) day of September, Nineteen Hundred and Eighteen (1918) by and between the Ozmo Oil Refining Company, a corporation, duly organized and existing under and by virtue of the laws of the State of California, party of the first part, hereinafter called the ‘Seller,’ and Cotton and Company of Buffalo, New York, party of the second part, hereinafter called the ‘Buyer.’

WITNESSETH:

That in consideration of the promises and agreements hereinafter contained on the part of each of the parties hereto to be performed, the parties hereto do hereby [89] agree as follows, to wit:

The Seller agrees to sell and deliver to the Buyer, and the Buyer agrees to purchase and receive from the Seller approximately Seven Hundred (700) tons of One Hundred Five (105) to One Hundred Eight (108) melting point, White Semi-refined Wax, similar to sample submitted and packed in double headed barrels, (oil barrels, suitable for export).

DELIVERIES: Fifty (50) tons per month to be shipped during each and every month beginning with November, Nineteen Hundred and Eighteen (1918) and ending with December, Nineteen Hundred and Nineteen.

PRICE: The price of wax to be nine and one quarter cents ($9\frac{1}{4}\text{¢}$) per pound in car lots f. o. b. San Francisco, California. The above price being subject to a discount of one per cent (1%), shipments to be made sight draft attached to bill of lading, and payable upon representation. Irrevocable credit to be established in our favor and subject to our demand every thirty (30) days as wax is being shipped.

DAMAGE CLAUSE: Neither party hereto shall be held liable for any damage or delays occasioned by, or arising out of strikes, riots, fires, insurrections, labor disturbances, Seller's inability to secure cars for product referred to, or any other clause beyond Seller's control.

All deliveries hereunder, are to be made subject to Governmental regulations, or laws governing deliveries of products specified in this agreement, and any additional costs to the Seller for making deliveries because of such [90] regulations or laws shall be borne by the Buyer.

SUCCESSOR IN INTEREST: It is expressly understood and agreed that this agreement shall bind the successors and assigns of the prospective parties hereto without express mention.

Your acceptance of the above in the space provided below shall constitute that a binding contract between us.

OZMO OIL REFINING COMPANY,

Seller.

(Signed) E. SWIFT TRAIN.

COTTON AND COMPANY, BUFFALO,

Buyer.

(Signed) A. P. LEON,

RUTGER, BLEECKER AND COMPANY, Brokers,

(Signed) RUTGER BLEECKER.

V.

That the plaintiff complied with all and every condition and term of said contract on its part to be performed, but that the defendant, Ozmo Oil Refining Company, failed to deliver any of said wax mentioned in said contract and failed to comply with said contract in every and all particulars.

VI.

That more than three thousand dollars (\$3,000) is

involved in the controversy set forth in the complaint herein.

VII.

That on or about the 30th day of September, 1918, and prior to the execution and delivery of said agreement between the plaintiff and the defendant, Ozmo Oil Refining Company, plaintiff sold 600 tons of said wax to the Standard Oil Company of New York, the same to be delivered 50 tons monthly from January to December, 1919, at $10\frac{1}{8}$ cents a pound in car lots, f. o. b. San Francisco, California, terms cash, which [91] sale was not consummated because the defendant, Ozmo Oil Refining Company, did not deliver any of the wax mentioned in the agreement between itself and the plaintiff.

VIII.

That plaintiff prior to the execution and delivery of said agreement between itself and the defendant, Ozmo Oil Refining Company, sold 100 tons of said wax to Mitsui & Company the same to be delivered 50 tons monthly in November and December, 1918, at $10\frac{1}{2}$ cents a pound in car lots, f. o. b. San Francisco, California, which sale was not consummated because the defendant, Ozmo Oil Refining Company did not deliver any of the wax mentioned in the agreement between itself and the plaintiff.

IX.

That prior to the execution and delivery of said agreement between plaintiff and the defendant, Ozmo Oil Refining Company, said defendant well knew and plaintiff informed it that plaintiff was about to purchase the wax mentioned in said agreement for

resale and had resold the same, and that on September 17, 1918, plaintiff notified defendant, Ozmo Oil Refining Company, by letter that it intended to offer the wax in question for sale and on September 30, 1918, it telegraphed defendant, Ozmo Oil Refining Company, that it had sold the wax to responsible parties and on October 3, 1918, it wrote defendant, Ozmo Oil Refining Company, that the wax had been resold to responsible parties, which letter defendant, Ozmo Oil Refining Company, received on October 9, 1918, and on October 8, 1918, plaintiff wrote defendant, Ozmo Oil Refining Company, that it had sold the wax to the Standard Oil Company of New York and Mitsui & Company, which letter defendant, [92] Ozmo Oil Refining Company, received on October 14, 1918.

X.

That subsequent to the said transaction set forth in the complaint herein the defendant, Ozmo Oil Refining Company, consolidated with the defendant, Petroleum Products Company, and said defendant, Ozmo Oil Refining Company, assigned and transferred all of its assets to the defendant, Petroleum Products Company, and said Petroleum Products Company assumed the obligations of defendant, Ozmo Oil Refining Company, arising out of the contract hereinbefore set forth and said liabilities of the said defendant, Ozmo Oil Refining Company, and agreed to pay the same, but the same has not been paid or any part thereof.

XI.

That the total price to be paid by the plaintiff

under said contract for said 700 tons of match wax, at $91\frac{1}{4}\text{¢}$ a pound, was \$129,500; that the resale price of 600 tons of said wax to the Standard Oil Company of New York, at $10\frac{1}{8}\text{¢}$ a pound, was \$121,500; that the resale price of 100 tons of said wax, at $10\frac{1}{2}\text{¢}$ a pound, to Mitsui & Company was \$21,000; that the total resale price of said wax was \$142,500; that the difference between the contract price and the resale price was \$13,000; that said match wax was to be delivered monthly from November 30, 1918, to December 31, 1919, payable cash on delivery by said purchasers, Standard Oil Company of New York and Mitsui & Company of San Francisco; that the average due date of said payments of said wax would be May 31, 1919.

XII.

That plaintiff has been damaged by reason of the [93] premises in the sum of \$13,000, and interest from May 31, 1919, no part of which has been paid.

CONCLUSIONS OF LAW.

And as conclusions of law from the foregoing facts the Court finds and decides that plaintiff, Cotton and Company, Inc., is entitled to judgment against the Ozmo Oil Refining Company and Petroleum Products Company, the defendants, and each of them, in the sum of \$13,000 and interest from May 31, 1919, and costs to be taxed.

Let judgment be entered accordingly.

Done in open court this 18th day of May, 1921.

WILLIAM C. VAN FLEET,

Judge.

Stipulation Re Settling Bill of Exceptions.

IT IS HEREBY STIPULATED that the foregoing bill of exceptions may be settled.

WILLARD P. SMITH,

WALTON C. WEBB,

Attorneys for Plaintiff.

THOMAS, BEEDY & LANAGAN,

Attorneys for Defendant. [94]

Order Settling Bill of Exceptions.

The foregoing bill of exceptions having been examined by me and found to be full, true and correct, is hereby settled and allowed as such.

Dated: San Francisco, this 1st day of August, 1921.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Aug. 1, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [95]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, Second Division.

No. 16,296.

COTTON & COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETROLEUM PRODUCTS COMPANY,

Defendants.

Assignment of Errors.

Come now the above-named defendants, Ozmo Oil Refining Company and Petroleum Products Company, and file the following assignment of errors upon which they, and each of them, will rely in the prosecution of the writ of errors in the above-entitled cause:

I.

The Court erred in approving and making the following finding of fact and in overruling defendants' objection to the same, which finding is finding of fact No. IV in the Court's decision embracing findings of fact and conclusions of law set forth in the bill of exceptions and is as follows, to wit:

"That on the 14th day of October, 1918, plaintiff and defendant, Ozmo Oil Refining Company, entered into an agreement in writing reading as follows:

'This agreement, made and entered into this fifth (5th) day of September, Nineteen Hundred and Eighteen (1918) by and between the Ozmo Oil Refining Company, a corporation, duly organized and existing under and by virtue of the laws of the [96] State of California, party of the first part, hereinafter called the "Seller," and Cotton and Company of Buffalo, New York, party of the second part, hereinafter called the "Buyer,"

WITNESSETH:

That in consideration of the promises and agreements hereinafter contained on the part

of each of the parties hereto to be performed, the parties hereto do hereby agree as follows, to wit:

The Seller agrees to sell and deliver to the Buyer, and the Buyer agrees to purchase and receive from the Seller approximately Seven Hundred (700) tons of One Hundred Five (105) to One Hundred eight (108) melting point, White Semi-refined Wax, similar to sample submitted and packed in double headed barrels, (oil barrels, suitable for export).

DELIVERIES: Fifty (50) tons per month to be shipped during each and every month beginning with November, Nineteen Hundred and Eighteen (1918) and ending with December, Nineteen Hundred and Nineteen.

PRICE: The price of wax to be nine and one quarter cents ($9\frac{1}{4}\text{¢}$) per pound in car lots f. o. b. San Francisco, California. The above price being subject to a discount of one per cent (1%), shipments to be made sight draft attached to bill of lading, and payable upon presentation. Irrevocable credit to be established in our favor and subject to our demand every thirty (30) days as wax is being shipped.

DAMAGE CLAUSE: Neither party hereto shall be held liable for any damage or delays occasioned by, or arising out of strikes, riots, fires, insurrections, labor disturbances, Seller's inability to secure cars for product referred to, or any other clause beyond Seller's control.

All deliveries hereunder, are to be made sub-

ject to Governmental regulations, or laws governing deliveries of products specified in this agreement, and any additional cost to the Seller for making deliveries because of such regulations or laws shall be borne by the Buyer.

SUCCESSORS IN INTEREST: It is expressly understood and agreed that this agreement shall bind the successors and assigns of the prospective parties hereto without express mention.

Your acceptance of the above in the space provided below shall constitute that a binding contract between us.

OZMO OIL REFINING COMPANY,
Seller.

(Signed) E. SWIFT TRAIN,
COTTON AND COMPANY, BUF-
FALO,

Buyer.

(Signed) A. P. LEON.
RUTGER, BLEECKER AND COM-
PANY, Brokers,
(Signed) RUTGER BLEECKER.''' [97]

II.

The Court erred in approving and making the following finding of fact and in overruling defendants' objection to the same, which finding is finding of fact No. VII in the Court's decision embracing findings of fact and conclusions of law set forth in the bill of exceptions and is as follows, to wit:

"That on or about the 30th day of September, 1918, and prior to the execution and delivery of

said agreement between the plaintiff and the defendant, Ozmo Oil Refining Company, plaintiff sold 600 tons of said wax to the Standard Oil Company of New York, the same to be delivered 50 tons monthly from January to December, 1919, at $10\frac{1}{8}$ cents a pound in car lots, f. o. b. San Francisco, California, terms cash, which sale was not consummated because the defendant, Ozmo Oil Refining Company, did not deliver any of the wax mentioned in the agreement between itself and the plaintiff."

III.

The Court erred in approving and making the following finding of fact and in overruling defendants' objection to the same, which finding is finding of fact No. VIII in the Court's decision embracing findings of fact and conclusions of law set forth in the bill of exceptions and is as follows, to wit:

"That plaintiff prior to the execution and delivery of said agreement between itself and the defendant, Ozmo Oil Refining Company, sold 100 tons of said wax to Mitsui & Company, the same to be delivered 50 tons monthly in November and December, 1918, at $10\frac{1}{2}$ cents a pound in car lots, f. o. b. San Francisco, California, which sale was not consummated because the defendant, Ozmo Oil Refining Company, did not deliver any of the wax mentioned in the agreement between itself and the plaintiff."

IV.

The Court erred in approving and making the following finding of fact and in overruling defend-

ants' objection to the same, which finding is finding of fact No. IX in the Court's decision embracing findings of fact and conclusions of law set forth in [98] the bill of exceptions and is as follows, to wit:

"That prior to the execution and delivery of said agreement between plaintiff and the defendant, Ozmo Oil Refining Company, said defendant well knew and plaintiff informed it that plaintiff was about to purchase the wax mentioned in said agreement for resale and had resold the same, and that on September 17, 1918, plaintiff notified defendant, Ozmo Oil Refining Company, by letter that it intended to offer the wax in question for sale and on September 30, 1918, it telegraphed defendant, Ozmo Oil Refining Company, that it had sold the wax to responsible parties and on October 3, 1918, it wrote defendant Ozmo Oil Refining Company, that the wax had been resold to responsible parties, which letter defendant, Ozmo Oil Refining Company, received on October 9, 1918, and on October 8, 1918, plaintiff wrote defendant, Ozmo Oil Refining Company, that it had sold the wax to the Standard Oil Company of New York and Mitsui & Company, which letter defendant, Ozmo Oil Refining Company, received on October 14, 1918."

V.

The Court erred in approving and making the following finding of fact and in overruling defendants' objection to the same, which finding is finding of fact No. XII in the Court's decision embracing

findings of fact and conclusions of law set forth in the bill of exceptions and is as follows, to wit:

“That plaintiff has been damaged by reason of the premises in the sum of \$13,000, and interest from May 31, 1919, no part of which has been paid.”

VI.

The Court erred in making and filing the following conclusions of law and in overruling defendants' objection to the same, which are the conclusions of law set forth in the decision of the Court embracing the findings of fact and conclusions of law as set forth in the bill of exceptions, and which are as follows, to wit:

“And as conclusions of law from the foregoing facts the Court finds and decides that plaintiff, Cotton and Company, Inc., is entitled to judgment against the Ozmo Oil Refining Company and Petroleum Products Company, the defendants, and each of them, in the sum of \$13,000, [99] and interest from May 31, 1919, and costs to be taxed.”

VII.

The Court erred in entering judgment herein in favor of plaintiff and against defendants.

WHEREFORE the defendants above named, the plaintiffs in error, pray that the judgment herein be reversed.

THOMAS, BEEDY & LANAGAN,

Attorneys for Defendants.

[Endorsed]: Filed Aug. 1, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [100]

In the District Court of the United States, in and
for the Southern Division of the Northern
District of California, Second Division.

No. 16,296.

COTTON & COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETRO-
LEUM PRODUCTS COMPANY,

Defendants.

**Petition for Writ of Error and Order Directing Writ
to Issue.**

The above-named defendants, Ozmo Oil Refining Company and Petroleum Products Company, feeling themselves aggrieved by the judgment of the Court entered herein on the 18th day of May, 1921, come now by their attorneys, Messrs. Thomas, Beedy & Lanagan, and petition this Honorable Court for an order allowing said defendants to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States on that behalf made and provided.

THOMAS, BEEDY & LANAGAN,

Attorneys for Defendants.

ORDER.

Let a writ of error in the above cause issue as
[101] prayed for in the above petition.

Dated: August 1st 1921.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Aug. 1, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [102]

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

BALTIMORE, MARYLAND.

No. 31318-21.

\$300.00.

In the District Court of the United States, Southern
Division, Northern District of California,
Second Division.

COTTON & COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETRO-
LEUM PRODUCTS COMPANY,

Defendants.

Costs on Appeal on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That We, Ozmo Oil Refining Company and Petro-
leum Products Company, as principals, and United
States Fidelity and Guaranty Company, as surety,
are held and firmly bound unto Cotton and Com-
pany, Inc., in the full and just sum of Three Hun-
dred and No/100 (\$300.00) Dollars, to be paid to the
said Cotton and Company, Inc., its certain attorney,

executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of August, in the year of our Lord one thousand nine hundred and twenty-one.

WHEREAS, lately at a District Court of the United States, Southern Division, Northern District, Second Division, in a suit depending in said court, between Cotton and Company, Inc., Plaintiff, vs. Ozmo Oil Refining Company and Petroleum Products Company, Defendants, a judgment was rendered against said Ozmo Oil Refining Company and Petroleum Products Company and the said Ozmo Oil Refining Company and Petroleum Products Company having obtained from said Court a [103] writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said Cotton and Company, Inc., citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth District.

NOW, the condition of the above obligation is such, that if the said Ozmo Oil Refining Company and Petroleum Products Company shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first
above written.

OZMO OIL REFINING COMPANY. (Seal)

By J. P. ROTHWELL,

Secretary.

PETROLEUM PRODUCTS COMPANY.

(Seal)

By J. P. ROTHWELL,

Secretary.

UNITED STATES FIDELITY AND

GUARANTY COMPANY. (Seal)

By HENRY V. D. JOHNS,

By ERNEST W. SWINGLEY,

Attorneys in Fact.

(Premium charged for this bond is \$10.00 per
annum.)

Approved:

FRANK H. RUDKIN,

Judge.

[Endorsed]: Filed Aug. 5, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [104]

In the District Court of the United States, in and
for the Southern Division of the Northern
District of California, Second Division.

No. 16,296.

COTTON & COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETRO-
LEUM PRODUCTS COMPANY,

Defendants.

Praecipe for Transcript of Record on Writ of Error.

To the Clerk of the Above-entitled Court:

Will you please certify to the Circuit Court of
Appeals of the Ninth Circuit the following records
herein, to wit:

The judgment-roll.

The bill of exceptions.

Assignment of errors.

Petition and order for writ of error, writ of error
and citation.

THOMAS, BEEDY & LANAGAN,

Attorneys for Defendants and Plaintiffs in Error.

[Endorsed]: Filed Aug. 2, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [105]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 16,296.

COTTON & COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETROLEUM PRODUCTS COMPANY,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of the United States, for the Northern District of California, do hereby certify the foregoing one hundred five (105) pages, numbered from 1 to 105, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$50.85; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are herewith annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of August, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [106]

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Ozmo Oil Refining Company and Petroleum Products Company, plaintiffs in error, and Cotton & Company, Inc., defendant in error, a manifest error hath happened, to the great damage of the said Ozmo Oil Refining Company and Petroleum Products Company, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at

the city and county of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 1st day of August, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by:

WM. C. VAN FLEET,
United States District Judge. [107]

Due service and receipt of a copy of the within writ of error admitted this 2d day of August, 1921.

WILLARD P. SMITH,
Attorney for Defts. in Error.

[Endorsed]: No. 16,296. United States District Court for the Northern District of California, Second Division. Ozmo Oil Refining Co. and Petroleum Products Co., Plaintiffs in Error, vs. Cotton & Company, Inc., Defendant in Error. Writ of Error. Filed Aug. 2, 1921. W. B. Maling. Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The Answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [108]

United States Circuit Court of Appeals for the
Ninth Circuit.

OZMO OIL REFINING COMPANY and PETRO-
LEUM PRODUCTS COMPANY,
Plaintiffs in Error,
vs.

COTTON & COMPANY, INC.,
Defendant in Error.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America, to
Cotton & Company, Inc., GREETING:

You are hereby cited and admonished to be in,

and appear at, the United States Circuit Court of Appeals, for the Ninth Circuit, at the city and county of San Francisco, State of California, within thirty (30) days from the date of this writ pursuant to a writ of error filed in the office of the clerk of the District Court for the Southern Division of the Northern District of California, Second Division, wherein Ozmo Oil Refining Company and Petroleum Products Company are plaintiffs in error and you the defendant in error, and show cause, if any there be, why the judgment in the said writ of error mentioned and entered on the 18th day of May, 1921, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States of America, this [109] 1st day of August, 1921.

WM. C. VAN FLEET,
District Judge.

Attest: _____,
Clerk. [110]

[Endorsed]: No. 16,296. Circuit Court of the United States, Ninth Circuit, Northern District of California. Ozmo Oil Refining Company and Petroleum Products Company, Plaintiffs in Error, vs. Cotton & Company, Inc., Defendant in Error. Citation on Writ of Error. Filed Aug. 2, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3752. United States Circuit Court of Appeals for the Ninth Circuit. Ozmo Oil Refining Company, a Corporation, and Petroleum Products Company, a Corporation, Plaintiffs in Error, vs. Cotton & Company, Incorporated, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed August 13, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3752

2

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OZMO OIL REFINING COMPANY (a corporation), and PETROLEUM PRODUCTS COMPANY
(a corporation),

Plaintiffs in Error,

vs.

COTTON & COMPANY, Incorporated,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

WILLIAM THOMAS,

LOUIS S. BEEDY,

JAMES LANAGAN,

THOMAS, BEEDY & LANAGAN,

Attorneys for Plaintiffs in Error.

FILED

OCT 10 1921

F. D. MONCKTON,

No. 3752

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OZMO OIL REFINING COMPANY (a corporation), and PETROLEUM PRODUCTS COMPANY (a corporation),

Plaintiffs in Error,

VS.

COTTON & COMPANY, Incorporated,

Defendant in Error

BRIEF FOR PLAINTIFFS IN ERROR.

This is an action by Messrs. Cotton & Company of Buffalo, New York, against the Ozmo Oil Refining Company and the Petroleum Products Company of California for damages for breach of a contract to sell 700 tons of white semi-refined wax, known as Match Wax. The Ozmo Company was to commence delivery of the wax in November, 1918, shipping 50 tons per month to and including December, 1919. The price of the wax was to be 91 $\frac{1}{4}$ c per pound, f.o.b. San Francisco. No wax was ever delivered.

The market price of the wax from November, 1918, to and including December, 1919, ranged from 9¢ to 6¢ per pound. (Transcript, page 113.) Under these facts, Messrs. Cotton & Company could not resort to the ordinary rule of damages, that is to say, the difference between the contract price and the market price of the wax. Instead, they sought as damages the difference between the contract price and the prices at which they had contracted to resell this wax to the Standard Oil Company and Messrs. Mitsui & Co.

The essential facts of the transaction are, as follows: In the latter part of August, 1918, the Ozmo Company got Messrs. Rutger, Bleecker & Company, brokers, to offer the wax to the trade. The brokers offered the wax to Messrs. Cotton & Company, who verbally accepted the proposition. The brokers then wrote to Messrs. Cotton & Company, as follows (Transcript, page 42):

“Letter-head
RUTGER, BLEECKER & Co.,
New York.

August 29, 1918.

The Cotton Co.,
37 Liberty St.,
New York City.

Gentlemen:

Attention of Mr. Leon.

We hereby confirm having sold to you for account of sellers on the Pacific Coast, who we believe are the Osmo Oil Refining Co., San Francisco, but subject to correction if any, 50 tons of Paraffine Wax monthly from November, 1918, to December, 1919, inclusive, in all 700

tons, quality—White Semi Refined, 105 to 108 degrees melting point not over 3% oil and moisture, packed in tight barrels, at 91¼c per lb. f.o.b. San Francisco, terms net cash, sight draft with bills of lading attached Pacific coast weights.

Official contract is being forwarded by our San Francisco office and in the meantime as confirmation we would suggest that you sign duplicate letter attached herewith.

Yours very truly,
Rutger, Bleecker & Co.
Per B. Rader."

In reply to that letter Messrs. Cotton & Company wrote Rutger, Bleecker & Co. the following letter (Transcript, page 43):

"August 31, 1912.

Rutger, Bleecker & Co.,
No. 87 Wall St.,
New York City.
Attention Mr. Rader.

Gentlemen:

We have your favor of the 29th inst., and confirm having purchased, through you, from the Ozmo Oil Refining Co. of San Francisco, seven hundred tons of Paraffine Wax, white semi-refined, 105/8° M. P., containing not over 30% oil and moisture, packed in double head barrels, for shipment fifty tons monthly, from November, 1918, to December, 1919, inclusive, at 91¼c per lb. f.o.b. San Francisco.

Terms net cash, sight draft attached bills of lading; Pacific Coast, gross weights less actual tares, as per licensed weighmaster's returns.

We are returning signed copy of your confirmation, as per your request, and await contracts, in order that we may send confirming purchase order.

Trusting that we shall be able to put through
some more business together, before long, we are

Yours very truly,

Cotton & Company, Inc.

Sales Manager."

APL.BS.

Up to this time Cotton & Company had not given any notice to Rutger-Bleecker & Co. of any contracts of resale.

On September 30th Cotton & Company entered into an agreement with the Standard Oil Company to sell them 600 tons of the wax. (Transcript, page 29.) On October 1st Cotton & Company entered into a contract with Messrs. Mitsui & Co. to sell them 100 tons of the wax.

In the meantime, the "official contract", referred to in the letter of Messrs. Rutger, Bleecker & Co. of August 29th, was forwarded from San Francisco for signature. There was some correspondence between the parties in regard to the question of establishing a letter of credit and the form of the official contract was finally modified and executed by both parties on October 14, 1918.

From the time of the exchange of letters between Cotton & Company and Messrs. Rutger, Bleecker & Co., up to October 14, 1918, the only evidence of any notice of resale is, as follows: Mr. Leon, sales manager for Cotton & Company, testified that after the transaction with Messrs. Rutger, Bleecker & Co. he told their Mr. Rader that Cotton & Company had resold the wax. (Transcript, pages

58, 60, 64 and 65.) At page 64 on redirect examination, he said:

“I notified Rutger, Bleecker & Co. within a few days that I had made a resale to the Standard Oil Company and Mitsui & Co.—within a very short time. That does not help me to refresh my memory as to how soon after the original offer and bid I notified Rutger, Bleecker & Co. that I had resold it, except that I know it was within a few days after the contract was closed. By this I mean after the offer had been made and accepted by Rutger, Bleecker & Co., and we had made a counter-bid which they accepted—but this was before any written contract was made.”

On September 30th Cotton & Company wired the Ozmo Oil Refining Company and said, amongst other things:

“This material sold responsible buyers.” (Transcript, page 49.)

On October 3rd Cotton & Company wrote the Ozmo Oil Company, amongst other things, as follows:

“The material has all been resold to responsible houses.” (Transcript, pages 71, 72.)

This letter was received by the Ozmo Company on October 14th. (Transcript, page 110.) On October 8th Messrs. Cotton & Company wrote to the Ozmo Company stating that they had resold 600 tons of the wax to the Standard Oil Company and 100 tons to Mitsui & Co. (Transcript, page 73.) This letter was received by the Ozmo Company on October 14th. (Transcript, page 110.)

Messrs. Cotton & Company did not make any purchase of wax in the market so as to be in a position to fill their contracts with the Standard Oil Company and Mitsui & Co. (Transcript, page 40.)

Under these facts three questions are involved:

First: Did Cotton & Company's letter of August 31, 1918, answering the letter of Messrs. Rutger, Bleecker & Co. of August 29th and confirming the purchase of the wax, constitute an acceptance of the offer and make a binding contract? If it did make a binding contract, then the decision in this case is wrong and ought to be reversed for the reason that when that binding contract was made there is no pretense that the Ozmo Company or Messrs. Rutger, Bleecker & Co., their agents, had any notice whatever of a resale by Messrs. Cotton & Company.

Second: Assuming that the two letters referred to did not make a binding contract and that there was no binding contract until October 14, 1918—the date of the execution of the so-called “official contract”—was the notice of resale given to the Ozmo Company sufficient to charge them with special damages—that is to say, the difference between the contract price and the resale price?

Third: With the market price of the wax less than the contract price, ought not Messrs. Cotton & Company to have gone into the open market and purchased 600 tons to fill the Standard Oil contract and 100 tons to fill the Mitsui & Co.?

Specification of Errors Relied On.

1. The Court erred in finding that the contract between the parties was made on October 14, 1918 (Transcript, page 124) instead of finding that the contract was made on August 31, 1918. (Transcript, page 43.)

2. The Court erred in finding that before the execution of a binding contract between the parties, the Ozmo Company knew that Cotton & Company were about to purchase the wax for resale, and that they had actually resold the same. (Transcript, page 128.)

3. The Court erred in finding that Messrs. Cotton & Company had been damaged in the sum of thirteen thousand dollars with interest from May 31, 1919. (Transcript, page 129.)

4. The Court erred in making its conclusion of law that Messrs. Cotton & Company were entitled to judgment against the Ozmo Oil Company in the sum of thirteen thousand dollars, with interest from May 31, 1919, and costs.

Argument.

POINT I. THE OZMO COMPANY'S AGENT'S OFFER OF AUGUST 29, 1918, AND ITS ACCEPTANCE BY COTTON & COMPANY IN THEIR LETTER OF AUGUST 31, 1918, CONSTITUTED A COMPLETE AND BINDING CONTRACT. THE FACT THAT A FURTHER WRITTEN CONTRACT WAS CONTEMPLATED IS IMMATERIAL.

The letter of Messrs. Rutger, Bleecker & Co. of August 29th and the reply of Cotton & Company

dated August 31st set forth every necessary part of a complete contract for the sale and purchase of 700 tons of paraffine wax. The subject matter was accurately described. It was to be white, semi-refined wax, 105-8° melting point, not over 3% oil and moisture. The packing was described, the price was set forth, the terms were directed in detail, and the time and place of delivery clearly indicated. A reading of these two letters will convince the Court that the minds of the parties met on all the essential terms of the contract. No further formal writing was needed for its full expression. It was a common and usual contract for the sale of an ordinary article of commerce. Why, then, did the brokers and Messrs. Cotton & Company refer to a contract which was to be drawn up? It is a matter of common knowledge that transactions such as these are financed by banks and that for the purpose of making the necessary arrangements the banks must have some evidence of what the parties have agreed upon. That was the purpose of the so-called "official contract", and it was the only purpose. We ask the Court to note particularly that the signing of this "official contract" was not expressly made a condition precedent to the parties being bound.

There are numerous cases in which similar contracts have been construed by the Courts. In *United States v. P. J. Carlin Construction Company*, 224 Federal, 859, a construction company submitted a bid on certain government work, which was accepted. A formal contract was contemplated and was drawn

up by the government and sent to the construction company, which refused to sign. The Court said, at page 862:

“(1) When parties enter into a mere verbal agreement, with the understanding that it shall be finally reduced to writing as the evidence of the terms of the contract, it may be that nothing is binding upon either party until the writing is executed. But where the parties reach an agreement through correspondence, intending that the agreement shall be subsequently expressed formally in a single paper or document, which, when signed, should be the evidence of what had been agreed upon, the obligatory character of the agreement cannot ordinarily be defeated by the failure of either party to sign the formal contract. If the court can see from the writings or correspondence that the minds of the parties have met, that a proposal has been submitted by one party which has been accepted by the other, and that the terms of the contract have been in all respects definitely agreed upon, one of the parties cannot evade or escape from his obligation by refusing to sign the formal contract, which the parties understood was subsequently to be drawn and executed. As said by the New York Court of Appeals in *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 214, 39 N. E. 75, 76, 29 L. R. A. 431, 43 Am. St. Rep. 757 (1894):

‘Any other rule would always permit a party who has entered into a contract like this through letters and telegraphic messages to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule, the contract would never be completed in cases where by changes in the market or other events occurring subsequent to the writ-

ten negotiations it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business.'

And in *Thomas v. Derring*, 1 Keen, 729 (1837), Lord Langdale, Master of the Rolls, stated the rule as follows:

'I have no hesitation in saying that, by the offer made and accepted as it appears to have been in this correspondence, a binding contract was completed between these parties. It is true that mention is made in the letters of an intended formal contract, to be afterwards drawn up; but there are many cases in which correspondence, referring to the future execution of a more formal agreement, has been held to constitute in itself a valid contract, and I think that the correspondence is equivalent to a contract in the present case.' "

In

New York etc. Co. v. Meyersdale Coal Co., 217 Federal, 747,

the New York Company quoted coal for delivery up to April 1, 1913, at \$1.00 a ton, f.o.b. cars at mine, to be shipped at the rate of from 2,000 to 2,500 tons per month. The Coal Company answered, accepting the bid, and also said,

"We will, in the course of a few days, make up the form of contract covering this purchase and send it to you, and in the meantime this letter will be sufficient authority for you to go ahead with shipments."

The contract referred to was never signed. The Court said, at page 750:

"As we read the letters, they show a complete meeting of minds upon all terms of the

contract, and we regard the signing of the suggested form merely as a desirable convenience, and not as a condition precedent. The plaintiff's letter of August 16th, with the inclosed writing, stated definitely the terms on which the plaintiff was willing to make the contract, and to these terms the defendant agreed on August 19th, making the single exception that the time for initial delivery should be changed. This was a counter proposition; but it dealt with one term only, and when the plaintiff agreed to the change the contract was complete, and nothing more was needed to bind both parties. We do not find in the letters the intention of either party not to be bound until a formal writing had been signed, and in this respect the case differs essentially from several decisions that have been cited.

Further discussion seems to be needless. No term was left unsettled; everything had been agreed upon, either expressly or by plain implication or reference; and we see no sufficient ground for supposing that the execution of a formal writing was made a condition precedent to the taking effect of the contract. Many authorities on this subject will be found in 9 Cyc. 288, note 99, in 7 A. & E. Ency. 140, notes 1 and 2, and in 29 L. R. A. 431, note to *Sanders v. Pottlitzer, etc., Co.*

The judgment is reversed, and a new venire is awarded."

In

Whitted v. Fairfield Cotton Mills, 210 Federal, 725,

there was a sale of machinery evidenced by a certain memorandum, with the understanding that a formal contract was to be drawn and signed later. The Court held that it was error not to submit to the jury

the memorandum and correspondence, together with other evidence bearing on the question as to whether a valid contract was entered into between the parties when the memorandum was signed.

In

Wehner v. Bauer, 160 Federal, 240,

an agreement was made between the parties, certain in its terms, with the understanding that it should be thereafter reduced to writing. The learned judge who tried the instant case said, at page 243:

“The rule, I think, is correctly stated in 7 Am. & Eng. Ency. of Law (2d Ed.) 140, where it is said:

‘Many cases occur where parties negotiating a contract contemplate that a formal agreement shall be drawn up and signed. The question arises, does such a contemporaneous understanding or agreement make the validity of the contract depend upon its being actually reduced to writing and signed? The rule may be stated in these words. Where the parties make the reduction of the agreement to writing, and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon. But where the par-contract, the mere reference to a future contract in writing will not negative the existence of a present contract.’

ties have assented to all the terms of the

The evidence, to my mind, brings the contract in suit clearly within the rule stated in the last paragraph of the quotation just made. The record discloses nothing from which it can be said that the carrying out of the contract was

in the mind of either party thereto to be made to depend upon its being reduced to writing."

In

McConnell v. Harrell and Nicholson Company,

149 Northwestern, 1042 (1914 Michigan),

the Harrell Company wrote the following letter to McConnell:

"Mr. E. J. McConnell,
Waterford, Mich.

Dear Sir: After going over the situation carefully, we have decided to handle ice provided it will not cost us to exceed 90c per ton 2,000 f.o.b. cars Waterford, and will be willing to enter into a contract to take a minimum of 2,000 tons with privilege of 5,000 tons. You will readily understand that being a brand-new proposition with us it is difficult to estimate probable tonnage; however, you will put yourself in position to furnish us up to the maximum, and it won't take long after the ice season begins for us to determine our approximate requirements, thus giving you time enough to take on additional business required to get rid of the harvest. Our desire will be to hook up with you for our supply from year to year and be assured we will get our requirements without seeking new sources of supply. We have, we might say, made a success in our present time with strong competition and without any iceman within two miles of us we fail to see why we should not find an outlet for a goodly tonnage of ice each season and a steady business the year round. We shall expend \$600 to try it out next year and will add as it grows.

Awaiting your acceptance and wishes as to further arrangements, we are,

Yours truly,

Harrell & Hoffman Co.,
O. Harrell, Prest. Mr."

To this letter the plaintiff replied, accepting the offer. The Harrell Company insisted that the letters were simply negotiations preliminary to a contract. The Court said, at page 1043:

“(1) Whether these letters constitute a completed contract, or whether they were but steps in negotiations leading up to one, is a question of the intention of the parties. *Gates v. Nelles*, 62 Mich. 444, 29 N. W. 73; *Wardell v. Williams*, 62, Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814; *Central Bitulithic Paving Co. v. Highland Park*, 164 Mich. 223, 129 N. W. 46, Ann. Cas. 1912B, 719. In *Congdon v. Darcy*, 46 Vt. 478, which considers a like question, the following suggestions are made as an aid in determining the intention of the parties in such cases:

‘In determining which view is entertained in any particular case, several circumstances may be helpful, as: Whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended to be the final closing of the contract.’

(2) In order to be enforceable, this contract, under our statute, would have to be in writing. It was in writing. It had few details. The amount involved was not what would be regarded in the commercial world as a large amount. The contract would be considered an ordinary one. There is nothing in the contract

which indicates that a written draft should be made before it became binding; in fact, the reverse of that is inferable from plaintiff's statement in his letter of acceptance, wherein he stated that he will proceed at once to purchase his lumber and erect his icehouse. True, he suggests that the contract be put in writing. This makes against the plaintiff's contention; but even this suggestion may be construed merely as a desire to have the terms of the contract put into more formal shape. *Mississippi, etc., Steamship Co. v. Swift*, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545."

In

Sanders v. Pottlitzer Bros. Fruit Company,
39 Northwestern, 75,

the Fruit Company, by letter, offered Sanders certain apples, specifying the quality, price, dates of shipment and terms. Sanders wanted some modification, and finally sent the following wire:

"Letter received. Will accept conditions if satisfactory answer and will forward contract."

The Fruit Company wired its reply, as follows:

"All right. Send contract as stated in our message."

Sanders prepared the contract and sent it to the Fruit Company, who returned it with certain modifications. This resulted in a refusal to sign the formal contract. The Court said, at page 76:

"The writings and telegrams that passed between the parties contain all the elements of a complete contract. Nothing was wanting in the plaintiff's original proposition but the defendant's assent to it, in order to constitute a con-

tract binding upon both parties according to its terms. This assent was given upon condition that a certain specified modification was accepted. The plaintiffs finally assented to the modification, and called upon the defendant to signify its assent again to the whole arrangement as thus modified, and it replied that it was "all right," which must be taken as conclusive evidence that the minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both. It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what had already been agreed upon. But neither party was entitled to insert in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions, not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition, as originally made, and the subsequent letters and telegrams; and, if they constituted a contract of themselves, the absence of the formal agreement contemplated was not, under the circumstances, material. When the parties intend that a mere verbal agreement shall be finally reduced to writing, as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed. But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the par-

ties, by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence.”

And again at page 77 :

“The principle, therefore, which is involved in the case, is this: Can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing, ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up or down, then this case is well decided. But if, at the close of the correspondence, the plaintiffs became bound by their offer, and the defendant by its acceptance of that offer, whether the final writing was signed or not, as I think it was, under such circumstances as the record discloses, then the conclusion of the learned referee was erroneous. To allow either party to repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element of confusion and uncertainty into the law of contract. If the parties did not become bound in this case, they cannot be bound in any case.”

In the light of these authorities we think it plain that when Cotton & Company accepted the offer made to them by Rutger, Bleecker & Co. in the letter of August 29th, a binding contract was made.

It is always instructive to find out how the parties themselves look upon the effect of such a transaction as we are now considering. On or about the 25th of September, Mr. Cotton and his sales manager, Mr. Leon, met Mr. Salisbury of the Standard Oil Company in the lobby of the Hotel Astor in New York City. Mr. Cotton's testimony is, as follows (Transcript, page 27):

"In the course of the conversation Mr. Salisbury asked me, us, what we were doing, what we had for sale, if we were doing any business. I replied to him that we had a substantial quantity of 105-8 melting point wax for sale, and asked if he was interested. His answer to that was an inquiry where this match wax was located. I told him in San Francisco. He said he might be interested in the purchasing of match wax in San Francisco and that if we would make him a price and let him have it firmly in hand for a few days, I think until the following Saturday, that he thought he would buy it."

Mr. Cotton evidently thought he had some kind of a hold on the wax. If he had only been negotiating for the purchase of wax, he probably would not have made Mr. Salisbury a firm offer.

On September 30, 1918, nearly two weeks before the formal contract was signed, Cotton & Company sent to the Ozmo Oil Refining Company a telegram (Transcript, page 49), in which they said, amongst other things:

"Referring our contract wax is this material packed tight iron hooped oil barrels?"

When Mr. Cotton said "contract wax", he meant the wax that he had confirmed purchasing in his letter of August 31, 1918.

Mr. Leon, Mr. Cotton's sales manager, testified on cross-examination, as follows (Transcript, pages 60-61):

"Q. Cotton & Company would not have re-sold the wax unless they had a contract which they considered binding, would they?

A. They considered it binding. It happens every day and as the market was practically at the peak at that time, it looked like a mighty good sale.

Q. So then it was not on the reliance of this contract?

A. Yes, absolutely, it was on the reliance of this contract. The contract was not signed, but it was upon the assumption that the contract would be signed that the sales were made. I have no knowledge myself whether Osmo Oil Refining Co. paid a commission to Rutger, Bleecker & Co.

Q. Is it the custom of the trade to consider that an accepted offer to sell binds the party making the offer? In other words, does it make a contract?

A. Well that is a difficult question. It does not make a contract—no—but of course it is understood that provided the parties agree on the conditions of payment and no other modifications are brought up later which might necessitate a (49) change in any other way in the original acceptance, then a sale has been consummated.

Q. Well, after, to adopt your phrase, a sale has been consummated, a seller according to the custom of the trade would not be in a position to repudiate it?

A. Certainly, if the buyer made objections to certain clauses in the contract, and so could the buyer if the seller made objections as to certain clauses or demands. For instance, should Cotton have refused to offer a letter of credit as Ozmo demanded, Ozmo might at their option have considered the sale as not binding or have agreed to ship the goods on sight draft terms as originally offered. It is done every day, for after the parties modify the terms they have to agree as to such modifications."

This explanation is naive, to say the least. Mr. Leon considered the offer and acceptance of the wax binding for the purpose of a resale to the Standard Oil Company, but not binding if either party made any objections to certain clauses or demands! On page 64 of the Transcript, we find Mr. Leon testifying on re-direct examination, as follows:

"That does not help me to refresh my memory as to how soon after the original offer and bid I notified Rutger, Bleecker & Co. that I had resold it, except that I know it was within a few days *after the contract was closed. By this I mean after the offer had been made and accepted by Rutger, Bleecker & Co., and we had made a counter-bid which they accepted—but this was before any written contract was made.*"

Here Mr. Leon has plainly said that when the offer was made and accepted—that is to say, on August 31, 1918—the "contract was closed". It is perfectly evident that Cotton & Company's reliance on the signature of the formal contract is an after-thought.

On September 17, 1918, Cotton & Company wrote to Rutger, Bleecker & Co. (Transcript, page 69) in which they said: "We wish to point out that *our purchase* was for 700 tons." Yet they now contend that they had not *purchased* any wax but were merely *negotiating* to that end.

On October 8, 1918, Cotton & Company again wrote the Ozmo Oil Refining Company, saying:

"We are enclosing herewith a letter covering 600 tons of wax purchased from you and which has been resold to the Standard Oil Company of New York. The 100 tons for shipment, 50 tons monthly November/December, 1918, has been resold to Messrs. Mitsui & Co., Ltd., of San Francisco."

Then follow instructions in regard to marking the Mitsui wax. They then say:

"In accordance with your request, we have arranged with our bank to open a letter of credit in your favor covering the entire amount of this contract, which will be done as soon as your signed contract has been received by us."

This shows beyond any question the real purpose of the formal contract. Cotton & Company had to have some convenient evidence other than correspondence to take to the bank in order to make the necessary arrangements for financing the purchase of the wax.

The Ozmo Oil Company also indicated that it considered the contract closed, for on September 25, 1918, it wired Cotton & Company, as follows:

“In reference to wax contract will you be kind enough to establish irrevocable credit in our favor with your bank in order that the sight drafts may be taken up when presented and due.”

The offer of August 29th, and Cotton & Company's acceptance of August 31st was a complete and binding contract, and no further writing was necessary to bind the parties. They contemplated an “official contract” simply to have the evidence of their agreement in a convenient form for financing purposes. This is made plain by Mr. Cotton's letter of September 17th. (Transcript, page 69.)

The contract being actually made on August 31, 1918, it follows that the Ozmo Company was not responsible for the special damages suffered by Cotton & Company on account of their inability to fill the Standard Oil and Mitsui contracts. There is no evidence whatever that the Ozmo Company, on or prior to August 31, 1918, had any notice of resale. According to Mr. Cotton and Mr. Leon, no resale was talked of until they met Mr. Salisbury at the Astor Hotel on or about September 25th. The true measure of damages for the Ozmo's breach of the contract was the difference between the market price and the contract price. The contract price was $9\frac{1}{4}c$ and the market price from November, 1918, to and including December, 1919, was never above $9c$. (Transcript, page 113.)

For the foregoing reasons it is submitted that the judgment in this case is wrong and ought to be

reversed. There are two other points, however, to which we wish to call the Court's attention.

POINT II. ASSUMING THAT NO CONTRACT FOR THE SALE OF THE WAX WAS MADE UNTIL OCTOBER 14, 1918, THE NOTICE OF RESALE GIVEN BY THE COTTON COMPANY TO THE OZMO COMPANY WAS INSUFFICIENT TO BRING INTO PLAY THE RULE ALLOWING LOSS OF PROFITS AS DAMAGES.

Let us see just what the evidence of resale amounted to. Mr. Leon testified (Transcript, page 64) that he notified Messrs. Rutger, Bleecker & Co. that he had resold the wax "within a few days after the contract was closed". Continuing, he said:

"By this, I mean after the offer had been made and accepted by Rutger, Bleecker & Co., and we had made a counter-bid which they accepted—but this was before any written contract was made."

On September 30th Cotton & Company wired the Ozmo Company, "This material sold responsible buyers". (Transcript, page 49.) On October 3, 1918, Cotton & Company wrote to the Ozmo Company, "The material has all been resold to responsible houses." (Transcript, pages 71, 72.) This letter was received by the Ozmo Company on October 14th, the date of the execution of the formal contract. (Transcript, page 110.)

On October 8, 1918, Cotton & Company wrote to the Ozmo Company stating that 600 tons of the wax had been resold to the Standard Oil Company and

100 tons to Mitsui & Co. (Transcript, page 73.) This letter was received by the Ozmo Company on October 14th, the date of the execution of the formal contract. (Transcript, page 110.)

It will be noted that prior to October 14th Cotton & Company had notified the Ozmo Company of one thing only—and that was that the material had been resold to responsible houses. No mention was made of the *market* in which the wax had been resold, nothing was said as to whether or not the resales had been made at a *profit*.

It is our contention that in order to charge a seller with loss of profits on resale he must know that the goods are either being purchased for resale in a particular market, or for the purpose of fulfilling a particular contract. This rule is set forth with great clearness in

2 *Mechem on Sales*, Sections 1761, 1762 and 1763.

It is as follows:

“Sec. 1761. LOSS OF PROFITS ON RESELL CONTRACTED FOR.—The case of the vendee who is seeking to recover damages for the loss of profits which he might have made upon a resale of the goods furnishes a typical instance of the application of the rule.

If the purchaser intended to resell the goods in the market, but had not in fact contracted for their resale; or if he had contracted to resell them, but at the market price, then the usual rule of the difference between the contract and the market price furnishes an adequate remedy. But, supposing that the vendee bought the goods

for resale in a particular market, or had actually made a contract for their resale at more than the market price, and loses the benefit or profit he might so have made, how then are his damages to be estimated?

Sec. 1762. **RESALE NOT CONTEMPLATED.**—Applying here the rules above laid down, the result will be that if the seller had, at the time he made the contract to sell, no knowledge or notice that the goods were being purchased for resale in a particular market or to be supplied under an existing contract for their resale at a particular price, no damages based upon the loss of that particular market or of the profit under that particular contract can be recovered. The buyer must here content himself with the damages which may be estimated upon the basis of the general market or the actual value. A resale at a particular profit is not so far the usual and the natural result, even when goods are known to be purchased for resale, as to bring it within the first branch of the rule of *Hadley v. Baxendale*.

Sec. 1763. **RESALE KNOWN TO VENDOR.**—If, however, at the time the contract is made, the seller has such notice or knowledge that the goods are being purchased for resale in a particular market, or to be supplied in pursuance of a particular contract, that he may fairly and reasonably be deemed to have made his contract in contemplation of that purpose, and to have assumed the risks thereby entailed, then, if he breaks his contract, damages for losses caused thereby, if not uncertain or remote, may be recovered.”

The evidence in this case certainly does not show that Messrs. Cotton & Company bought the wax for resale in a particular market. Prior to October 14th, the date of the execution of the “formal con-

tract", they had said only one thing to the Ozmo Company and that was that the material had been resold to responsible houses. As a matter of fact, one of these houses bought the goods for the Japanese market, but this was unknown to the Ozmo Company. In the nature of things, they could not know in which market Messrs. Cotton & Company intended to dispose of the wax. No mention was made of the price at which Cotton & Company had resold. They might have resold the wax at the same price, either for the purpose of accommodating a customer or to carry out some previous arrangement. At any rate, the Ozmo Company was not notified in any way that Cotton & Company had resold at any particular price. It has been held time and again that mere knowledge that goods are bought for resale will not render expected profits on resale an element of damages.

Globe Refining Co. v. Landa Cotton Oil Co.,
190 U. S., 540, 47 Lawyers' Edition, 1171.

In

Setton v. Eberle-Albrecht Flour Company, 258
Federal,

the Court said, at page 907:

"(2) To the general rule there is an exception, which is accurately expressed in Sutherland on Damages, section 662, page 2343, as follows:

'If the buyer has, in advance, made a contract for resale, and discloses that fact to his vendor, who undertakes to furnish the commodity and deliver it at a specified time and place, arranged with reference to enabling

the buyer to fulfill his contract for resale, and the vendor fails to deliver the property, he will be liable for damages on the basis of the profits the vendee would realize upon his contract for such resale.'

This exception is well illustrated and explained in *Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141; *Howard Supply Co. v. Wells*, 176 Fed. 512, 100 C. C. A. 70; *West Drug Co. v. Byrd*, 92 Fed. 290, 293, 34 C. C. A. 351; *Southern Flour & Grain Co. v. McGeehan*, 144 Wis. 130, 128 N. W. 879.

Mere knowledge that goods are purchased for resale in the ordinary course of business will not take the transaction out of the general rule and place it under the exception. If that were not so, the exception would swallow up the general rule completely, for it is always known that, when goods are bought from a manufacturer by a broker or wholesaler, or by a retailer from a jobber, the buyer purchases for resale. To bring a case within the exception, the buyer must have an existing contract for resale at the time of the purchase, and must buy for the purpose of enabling himself to perform his obligations on the resale, and these features must be clearly explained to the seller, and he must enter into his contract for the purpose of enabling the buyer to perform his obligations under the contract of resale. The same result will follow if the buyer is acting as the agent of the seller, as in *Cook Mfg. Co. v. Randall*, 62 Iowa, 244, 17 N. W. 510, and *McCormick Harvesting Co. v. Jensen*, 29 Neb. 102, 45 N. W. 160.

It will be found, upon a careful examination of authorities entitled to be considered, that in order to take a case out of the general rule there must be present some special feature, such as those to which we have adverted. Such special features must be sufficient to take the case out of the special title of Sales and place it under

the general law of Contracts. Then the rule of *Hadley v. Baxendale*, 9 Exch. 341, as qualified by later decisions, may control. *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171. Mere knowledge that goods are purchased for resale is not sufficient to produce that result. One reason for this is that the market price at the place where the goods are to be resold carries the transaction one stage nearer the ultimate consumer than the original sale, and always shows a higher market value than that which controlled between the original buyer and seller. It would be manifestly unjust to measure the damages by a market value thus enhanced. This feature is well explained by Judge Adams, speaking for this court, in *Salmon v. Helena Box Co.*, 147 Fed. 408, 412, 413, 77 C. C. A. 586."

To the same effect

Rahm v. Deig, 23 Northwestern, 141 (Indiana);

Wappoo Mills v. Commercial Guano Company, 18 Southeastern, 308;

Huggins v. Southeastern Lime & Cement Company, 48 Southeastern, 933;

Alabama Chemical Company v. Geiss, 39 Southern, 255;

Righter v. Clark, 60 Atlantic, 741.

As Judge Amidon said in the *Setton* case,

"To bring a case within the exception, the buyer must have an existing contract of resale at the time of the purchase, and must buy for the purpose of enabling himself to perform his obligations on the resale, and these features must be clearly explained to the seller, and he must enter into his contract for the

purpose of enabling the buyer to perform his obligations under the contract of resale.”

We do not think that Messrs. Cotton & Company succeeded in bringing themselves within this rule by merely notifying the Ozmo Company that the wax had been resold to “responsible houses”. To be entitled to the special damages claimed, they ought to have notified the Ozmo Company that they had contracts for resale in a particular market and at a profit. They did neither, and they should have been limited in this case to the recovery of the difference between the contract price and the market price at the time and place of delivery. As there was no margin in their favor, judgment should have been for the Ozmo Company.

POINT III. UPON THE FAILURE OF THE OZMO COMPANY TO DELIVER THE WAX, IT WAS THE DUTY OF MESSRS. COTTON & COMPANY TO MINIMIZE THEIR DAMAGES BY PURCHASE IN THE OPEN MARKET.

This they did not do. (Transcript, page 40.)

The rule seems to be that where a seller of a merchantable commodity fails to furnish the goods according to promise, it is incumbent on the buyer to provide himself as cheaply as he conveniently can, from the most accessible sources, and thus lighten the loss, and his recovery will be curtailed by the sum which thus might have been saved.

Creve Coeur Lake Ice Co. v. Tamm, 90 Mo. Appeals, 189;

Armeny v. Madson & Buck Co., 111 Ill. Appeals, 621;

Bannon v. St. Bernard Coal Co., 39 Southwestern, 252;

Consolidated Coal Company v. Mexico Fire Brick Co., 66 Missouri Appeals, 296;

Kinports v. Breon, 44 Atlantic, 436;

Edgeworth v. Talerico, 95 Southwestern, 677.

In

Benjamin on Sales, 7th Edition, at page 934, we find this language:

“In every case the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss.”

It is admitted that the market price of the wax, f.o.b. San Francisco, from November, 1918, to and including December, 1919, was never over 9c per pound, and that for two months during that period it was as low as 4½c per pound. Cotton & Company could have gone into the market and purchased wax against their Standard Oil and Mitsui contracts, but there is no evidence of any attempt to do so. Mr. Cotton explained (Transcript, page 40) that he did not dare to make purchases “in view of the fact that they insisted they were going to compel us to take delivery of this wax, which they claimed all the time they could furnish”. It is hard to understand how the Ozmo Company could have compelled Mr. Cotton to take delivery of the wax, as they had failed to deliver any wax in November,

1918, the time provided for the first delivery of fifty tons.

SUMMARY.

It clearly appears from the evidence that the contract to purchase the wax was made on August 31, 1918, before any notice whatever of resale or intent to resell was given by the buyer. This in itself demonstrates the trial court's error in applying the rule of special damages.

If we admit for the sake of argument that no contract was made until October 14, 1918, then the notice given by the buyer was insufficient because it did not advise the seller that the goods were bought for resale in a particular market or at a profit.

The failure of the buyer to go into the open market and buy wax against the Standard Oil and Mitsui contracts was a breach of its duty to lighten its loss.

It is respectfully submitted that the judgment ought to be reversed and that the plaintiffs in error should have judgment against the defendant in error for their costs.

Dated, San Francisco,
October 10, 1921.

WILLIAM THOMAS,
LOUIS S. BEEDY,
JAMES LANAGAN,
THOMAS, BEEDY & LANAGAN,
Attorneys for Plaintiffs in Error.

No. 3752

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OZMO OIL REFINING COMPANY (a corporation), and PETROLEUM PRODUCTS COMPANY (a corporation),

Plaintiffs in Error,

VS.

COTTON & COMPANY, Incorporated,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WILLARD P. SMITH,
Attorney for Defendant in Error.

FILED

OCT 21 1921

F. D. MONCKTON,

CLERK

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Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

This is an action by Cotton & Company, a New York corporation, against the Ozmo Oil Refining Company and the Petroleum Products Company, California corporations, for damages for breach of a contract to sell 700 tons of white semi-refined wax, commonly known as match wax. The wax was to be similar to sample submitted, the price was 91¼ cents per pound. No wax was ever delivered.

Prior to the execution of the contract, Cotton & Company had sold the wax to the Standard Oil

Company and Mitsui & Company, at a profit; and, upon the trial below, Cotton & Company recovered a judgment for the amount of the profits which they would have made from such re-sale. No exceptions to the findings are to be found in the bill of exceptions. Certain assignments of error appear in the Transcript.

Facts.

Cotton & Company, in August, 1918, entered into negotiations to purchase from Ozmo Oil Refining Company 700 tons of paraffine wax. On August 29th, 1918, Rutger, Bleeker & Company, brokers in New York City, wrote a letter to Cotton & Company, confirming the sale to them of 700 tons of paraffine wax at $9\frac{1}{4}$ cents a pound, and enclosed a duplicate letter asking Cotton & Company to sign it (Trans. p. 42). Cotton & Company, on August 31st, confirmed the sale in a letter of that date to Rutger, Bleeker & Company, in which they made certain suggested changes in the packing, weights and specifications (Trans. p. 43). Rutger, Bleeker & Company stated that official contracts were being forwarded to San Francisco; and Cotton & Company said they would await those contracts. The contracts, dated September 5th, 1918, were then drawn up, but were not received by Cotton & Company in their final form until October 14th, 1918. This was due to the fact that several changes had been made in the contracts.

The contracts as finally agreed upon did not agree with the brokers' agreement contained in the letters of August 29th and 31st, before referred to. It varied from the brokers' letters in several material particulars which will be pointed out later. It called for a sale by sample, different terms of payment, introduced damage clauses, changed the method of packing, fixed the moisture content, made it subject to government control, etc.

On September 30th, 1918, Cotton & Company sold 600 tons of this wax to the Standard Oil Company for $10\frac{1}{8}$ cents a pound, and on October 1st the remaining 100 tons to Mitsui & Company at $10\frac{1}{2}$ cents per pound, an advance of $\frac{7}{8}$ cents per pound and $11\frac{1}{4}$ cents per pound respectively. For which profits defendant in error recovered damages below. Ozmo was notified by Leon, the sales manager of Cotton & Company, at the time of the brokers' sale and before the execution of contract that the wax had been sold by Cotton & Company (Trans. p. 58). And Cotton & Company, on September 17th, 1918, notified Ozmo that it would offer the material for sale (Trans. p. 69). And on September 30th wired that it had sold to responsible buyers (Trans. p. 49). And on October 3rd wrote that it had been resold (Trans. p. 72), and on October 8th wrote that it had been sold to the Standard Oil Company and Mitsui & Company (Trans. p. 73). And the Court below found that, prior to the execution of the contract, Cotton had informed Ozmo that it was about to purchase said wax for resale

and had sold the same (Trans. pp. 20-21). No wax was ever delivered under the contract (Trans. p. 20). Wax had fallen in price after the making of the contract; but Cotton did not purchase to fill its contracts because Ozmo was insisting that it could and would furnish the wax (Trans. p. 40).

Law.

POINT I.

THE LETTER OF COTTON & COMPANY, DATED AUGUST 31ST, 1918, ANSWERING THE LETTER OF RUTGER, BLEEKER & COMPANY OF AUGUST 29TH, DID NOT CONSTITUTE THE CONTRACT BETWEEN COTTON & COMPANY AND THE OZMO COMPANY.

(a) The letter of August 31st was not an unqualified acceptance. It differed from the offer in three particulars:

1. The packing was different. It was offered "packed in tight barrels" (Trans. p. 42). It was accepted to be "packed in double headed barrels" (Trans. p. 43). The contract finally signed by the parties called for "packed in double headed barrels" "(oil barrels, suitable for export)" (Trans. p. 18).

2. The terms in the brokers' offer were also different. The brokers' offer called for "Pacific Coast weights" (Trans. p. 42). While the acceptance reads, "Pacific Coast gross weights less actual tares as per licensed Weigh Master's returns" (Trans.

p. 43). While the final contract omits all reference to weights (Trans. pp. 17, 18, 19).

3. The moisture content was different. The offer called for "not over 3% oil and moisture" (Trans. p. 42). While the acceptance reads, "not over 30% oil or moisture" (Trans. p. 43).

The above shows the difference between the brokers' offer and the brokers' acceptance. There are very material differences between the brokers' arrangements and the contract itself, as we will point out later.

(b) The parties intended to put their agreement in final form, and the letters referred to were only preliminary to such agreement. The letters of August 29th and August 31st referred to the fact that "an official contract is being forwarded" (Trans. pp. 111, 112).

(c) The contract itself differs materially from the agreement contained in the letters.

1. The most remarkable difference between the brokers' arrangement and the final contract is that the contract itself calls for a sale by sample. It reads, white semi-refined wax "similar to sample submitted" (Trans. p. 18). This is an entirely different contract from that proposed by the brokers. The so-called brokers' contract is an ordinary contract of sale, but the final contract of the parties is a sale by sample and an entirely different kind of a contract, involving different methods of proof. Under the brokers' contract, evidence would be

offered to show that it was white semi-refined wax; but, under the final contract, the question would be primarily whether it was like the sample submitted.

2. The terms of payment were modified in the contract. The original offer called for sight draft bill of lading attached (Trans. p. 42). The contract called for "irrevocable credit to be established in Ozmo's favor subject to demand every thirty days as wax is being shipped" (Trans. p. 18). Under the brokers' arrangement the wax might be paid for at New York, London or Yokohama, shipped on sight draft with bill of lading; but by changing the contract to irrevocable credit to be established in Ozmo's favor, Ozmo was able to get cash at San Francisco when the wax was shipped and not await the arrival of the bill of lading at the point of delivery with the possibility of the shipment being refused and the wax being thrown back on Ozmo's hands at a distant point. Under the irrevocable credit, the wax had to be accepted at San Francisco. This was a material change greatly to the advantage of Ozmo.

3. The original brokers' arrangement called for 50 tons monthly (Trans. p. 42). While the contract submitted first called for 35 to 50 tons monthly (Trans. p. 70).

4. The brokers' arrangement called for "packed in tight barrels" (Trans. p. 42). While the final contract called for "packed in double headed bar-

rels or oil barrels suitable for export" (Trans. p. 18).

5. The final contract contains a damage clause which provides that neither party shall be liable for any damage or delays occasioned by strikes, riots, fires, insurrection, labor disturbances, inability to secure cars, or any other cause beyond seller's control. It also provides that deliveries are subject to governmental regulations, and that the buyers shall bear any additional cost in making deliveries under such regulations. It provides that the agreement shall bind the successors and assigns of the respective parties.

As we have just pointed out, the contract itself differs in the foregoing manner from the brokers' offer and acceptance, and we respectfully submit that these changes are material, and that the parties having agreed to these changes, the brokers' arrangement was no longer of any effect.

The argument of plaintiff in error is based on cases where an attempt was made by a party to back out of a contract. There is no such question here. Neither party repudiated the contract, either the formal or the informal arrangement, but they entered into a written agreement materially different from the preliminary arrangements made for the parties by the brokers. Both parties here agreed to a modified contract and acted under the modified agreement and not under the original agreement. This is particularly true with respect to the

irrevocable credit, as Ozmo refused to recognize the contract unless the irrevocable credit was established. Cotton wired Ozmo October 2nd: "Will arrange credit promptly upon receipt of signed contract" (Trans. p. 71). And on October 3rd Cotton wrote Ozmo. "We are willing to co-operate with you to the extent of a bank guarantee or a letter of credit for the amount of our purchase, but do not understand why this should be necessary as the material has all been resold to responsible houses, and *particularly in view of the fact that no mention of these terms was made in your contract which we signed*" (Trans. p. 72). Cotton signed the first draught of the contract and when it was returned to Ozmo they changed it by inserting the clause in regard to irrevocable credit (Trans. p. 78).

And in Ozmo's letter of October 10th they speak of drawing up new contracts for the purpose of inserting a clause in regard to irrevocable credit, as this was inadvertently omitted from the originally prepared contract of September 5th (Trans. p. 78).

(d) The parties themselves acted under the formal agreement and accepted that as the contract and not the preliminary arrangement of the brokers.

In particular, we have pointed out that the Ozmo people refused to go on with the transaction until the letter of credit was established. Under the letters of August 29th and 31st, Cotton would not

have been obliged to put up any money until the wax was delivered to him; but, as a matter of fact, it established a letter of credit in October, although no deliveries were ever made on the contract, and it was thereby put to considerable expense, which proved to be entirely unnecessary (Trans. p. 107).

It may be conceded at the outset that, under certain circumstances, parties can be bound by preliminary correspondence although it was agreed that a formal contract would be drawn up. As was said in

Ridgway v. Wharton, 6 H. L. Cas. 238; 10 Reprint 1287.

“I again protest against its being supposed, because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made, but the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement.”

“Generally speaking, the circumstance that the parties did intend a subsequent agreement to be made is strong evidence that they did not intend the previous negotiations to amount to an agreement.”

13 Corp. Juris, p. 292.

“The fact that parties negotiating a contract contemplated that a formal agreement should be prepared and signed is some evidence that they did not intend to bind themselves until

the agreement was reduced to writing and signed.”

6 R. C. L. 619;

Ann. Cas. 1912 B. 130 note.

“So where the directors of the corporation, by vote, accepted a proposition made to them by defendant, and by a separate resolution directed the treasurer to inform the defendants of the acceptance and the agreement is thereafter reduced to writing and signed by the parties, and embodies some provisions in amplification of the proposal and acceptance but not contained therein, the contract will be deemed to have been made as of the date of execution and delivery of the written agreement and not as of the date of the passage of the resolution accepting the proposition.” * * * “It may be conceded that the offer and acceptance amounted to a meeting of the minds of the parties and would be sufficient to constitute a contract between them if they so understood and intended. But where parties to an arrangement of this kind show, either by express words or by their action, that they regard it as preliminary only, and to be put into final shape thereafter, and subsequently execute a formal instrument in writing, the latter is the only contract and the preliminary steps, however elaborate, go into the category of mere negotiations leading up to the final result. This is always the presumption of law where a written contract is made. * * * The written contract embodied some provisions that were not in the proposal and acceptance; these provisions, it is true, are in harmony with the prior arrangement and are merely supplementary to it, but if they had in any way been in

conflict, they must have prevailed, as the final agreement of the parties.”

Keystone S. S. Co. v. Bate, 46 Atlantic 887 (Penn.).

So here the final agreement is a sale by sample, and if any conflict arose in our case, the law regarding a sale by sample would have been applied, while it could not have been applied under the so-called brokers' acceptance, as nothing was therein said about "sample"; so, if a dispute arose over the packing, the final contract would prevail. Especially is this true because the acceptance of the brokers' offer called for different packing from that mentioned in the original offer. So, too, the terms are entirely different in regard to credit. And, besides all these differences, the final contract contains a damage clause. None of which provisions were even mentioned in the brokers' offer and acceptance. The parties discarded the terms of the brokers' offer and acceptance entirely, and by their own construction adopted the terms of the formal agreement.

All of the cases cited by plaintiff in error are where a party, having come to terms with the other but not having signed a formal agreement, contended that for that reason he was not bound.

The plaintiff in error has cited the following cases on this point:

U. S. v. P. J. Carlin Constr. Co. 224 Fed. 859;

N. Y. v. Meyersvale Coal Co., 217 Fed. 747;
Whitted v. The Fairfield Cotton Mills, 210
Fed. 725;

Wehner v. Bower, 160 Fed. 240;

McConnell v. Harrell, 149 N. W. 1042;

Sanders v. Pottlitzer, 39 N. E. 75.

In *U. S. v. P. J. Carlin Construction Company*, the construction company submitted a bid which was accepted. A formal contract was contemplated, but the Government inserted in this contract certain provisions not contained in the bid, which the construction company refused to agree to. The contractor's bid was submitted upon condition of its acceptance within 60 days. When the contractor refused to agree to the new conditions imposed in the contract, the Government, more than 60 days after the bid had been accepted, unconditionally accepted the bid, and it was held that there was no contract.

In *N. Y. v. Meyersvale Coal Company* suit was brought on the theory that the terms were all contained in the correspondence although no written contract as contemplated was ever signed by the coal company.

In *Wehner v. Bower*, the details of the contract were agreed to and it was proposed to enter into a written contract, which was not done. The contract was held valid, nevertheless.

In *McConnell v. Harrell*, a correspondence was entered into covering all the points. The corre-

spondence was between the parties and not the brokers, and, while a formal agreement was proposed, none whatever was drawn up or signed. It was held that all of the terms were contained in the correspondence and that the parties were bound by it although a formal contract had not been executed.

In *Sanders v. Pottlitzer* the proposed contract contained new provisions that were burdensome and expensive to plaintiff, who refused to accept the new contract on account of the insertion of such provisions. But in our case the new conditions were inserted and agreed to by both parties.

In each of the cases above cited the facts were entirely different from those in our case. It was held in each of these cases that, the details of the arrangement having been set forth in correspondence, the parties were liable notwithstanding the fact that a formal contract, by them contemplated, had never been drawn up and signed. In each case one of the parties was attempting to back out of the arrangement because of the failure to sign a formal contract; but the Court held that the terms, having been fully expressed in writing and no condition had been imposed that a formal contract would have to be signed before the agreement between the parties would be considered valid, that the parties were bound although no formal contract was ever executed.

However, in our case there is no attempt on the part of either party to repudiate the contract or the brokers' offer and acceptance. In our case both parties recognized that the brokers' offer and acceptance did not express all of the conditions, and they therefore awaited the drawing of the final written agreement before considering the matter as consummated.

It is noted that the Ozmo Company refused absolutely to go ahead with the deal until the irrevocable credit had been established by Cotton & Company. This was quite a burdensome provision, as it meant that Cotton & Company had to establish banking credit at San Francisco to the total value of the contract, which was 700 tons of wax at $9\frac{1}{4}$ cents a pound, or \$129,500.00. There was no such provision whatever in the brokers' offer and acceptance.

In none of the cases cited had a contract been signed. They are all cases where one party was trying to absolve himself because of the failure to sign a contract, and the facts are not at all like the facts in this case.

The parties here discarded the terms of the brokers' contract entirely and by their own construction adopted the terms of the formal agreement. Both parties here stood by the agreement, Cotton demanding deliveries (Trans. pp. 84, 92, 93), and Ozmo insisting on its ability to deliver (Trans. pp. 86, 87, 88, 94).

In 13 Corpus Juris, 289, it is stated:

“The preliminary negotiations leading up to the execution of the contract must be distinguished from the contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of the agreement to be entered into. To be final, the agreement must extend to all the terms that the parties intend to introduce, and material terms cannot be left for future settlement. Nor is there a binding contract where, although its terms have been agreed on orally, the parties have also agreed that it shall not be binding until evidenced by writing.”

Dillingham v. Dahlgren, 198 Pac. 832 (Cal. App. 1921).

In Ambler v. Whipple, 87 U. S. 546; 22 Law. Ed. 403, the Court said:

“It is very clear that both parties intended to have a written instrument signed by each as the evidence of any contract they might make on that subject, and neither considered any contract concluded until it was fully executed.”

In Mercantile Trust Co. v. Sunset Oil Co., 176 Cal. 461 (1917), the Court said at page 469:

“It is entirely clear from the evidence that all the parties contemplated that any arrangement finally made was to be evidenced in writing and that the draught submitted to and subsequently approved by the Union Oil Co. constituted the form of writing by which the end was to be accomplished. It is elementary where ‘it is a part of the understanding between the parties that the terms of the contract are to be reduced to writing and signed by the parties, the assent to which terms must be evidenced in the manner

agreed upon or it does not become a binding or completed contract.' Until the return of the papers by the Union Oil Co. the parties were still negotiating regarding the terms of the writings which were intended to ultimately embody the proposed agreement respecting the subordination of the bonds to the lease."

In our case the agreement itself was submitted and changed several times and finally agreed to and executed by both the parties.

In *Las Palmas v. Garrett*, 167 Cal. 397 (1914), at p. 400, the Court said:

"There is enough in the evidence to support the conclusion in the trial Court that it was the understanding of the parties that the agreements were to be reduced to writing and were not to become binding upon either party until evidenced by a written contract or agreement. If such was the understanding, it was essential to a valid and binding contract that defendant should unequivocally consent in writing to the terms stated in the writing of January 21st, 1910."

In *Spinney v. Downing*, 108 Cal. 666 (1895), *Van Fleet, J.*, said:

"It is a general rule, to which this case presents no exception, that, when it is a part of the understanding of the parties that when the terms of the contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract. This is essentially true when, as here, the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other."

Talmage v. Arrowhead R. Co., 101 Cal. 367:

“In *Pacific Rolling Mill v. Railway Co.*, 90 Cal. 627, the Court said at p. 633: ‘Besides, the letter proposed and the enclosed draft contained materially new terms of the agreement, namely the personal guarantee of Mr. Evans and J. G. North. No such guarantee had been asked for before.’”

So here, Ozmo insisted upon inserting in the formal contract the provision that Cotton furnish a letter of credit (Trans. p. 78), while the original brokers’ offer provided merely for a sight draft with a bill of lading attached (Trans. p. 42); a material change in the terms of payment.

In *Los Angeles Cooperative Association v. Phillips*, 56 Cal. 539, a memorandum of items of an agreement *as a basis* upon which to conclude a contract was held not to be sufficient to be treated as a concluded contract.

Fuller v. Reed, 38 Cal. 99.

The intention of the parties is to be deduced by the language employed by them—the question being not what intention existed in the minds of the parties, but the intention expressed by the language used.

13 Corpus Juris, 524.

The final agreement was a sale by sample, while the brokers’ offer and acceptance was not.

“Care should be taken not to construe as an agreement letters which the parties intended only as preliminary negotiations.”

Lyman v. Robinson, 14 Allen 254 (Mass.).

It is quite clear that the arrangement made with the brokers was preliminary, because:

1. The acceptance was not unqualified.
2. The intention was to execute a formal contract.
3. The formal contract was executed by both the parties and contained clauses materially different from the original offer, in that the contract called for a sale by sample, and introduced new arrangements in regard to payment, damage clauses and governmental regulations.
4. The formal agreement was adopted by the parties as the contract and they acted under that and not under the original offer.
5. The contract itself was never repudiated by either party.
6. The Court below found, and there was evidence to support it as the finding, that the formal agreement and not the original offer was the agreement by the parties; and there is no exception in the record to such finding.

POINT II.

NOTICE OF RESALE WAS GIVEN BY COTTON & CO. TO THE OZMO CO. PRIOR TO THE EXECUTION OF THE CONTRACT MADE OCTOBER 14, 1918, AND DEFENDANT IN ERROR WAS ENTITLED TO THE PROFITS IT WOULD HAVE MADE ON THE RESALE OF THE WAX TO THE STANDARD OIL CO. AND MITSUI & CO.

The contract called for 700 tons of wax at 91¼ cents a pound (Trans. p. 18). It was made on Octo-

ber 14, 1918. 600 tons of the same wax was sold by Cotton & Co. on September 30, 1918, to the Standard Oil Co. at $10\frac{1}{8}\text{¢}$ an advance of $7\frac{7}{8}\text{¢}$ a pound. 100 tons was sold October 1, 1918, to Mitsui & Co. at $10\frac{1}{2}\text{¢}$ a pound, an advance of $1\frac{1}{4}\text{¢}$ a pound (Trans. p. 20). Defendant in error pleaded such special damages (Trans. p. 6) and recovered the same below. No exception to the Court's finding is found in the bill of exceptions.

The evidence of notice of resale given by Cotton to Ozmo is as follows: Leon, sales manager for Cotton, notified Ozmo's brokers, Rutger, Bleecker & Co. within a few days after he had made the sale to the Standard Oil Co. "within a few days" after the offer had been made and accepted by Rutger Bleecker Co.—"before any written contract was made" (Trans. p. 64). "I know that we told Rutger Bleecker & Co. that the wax had been resold" (Trans. p. 65). "I told them that before any written contracts were entered into" (Trans. p. 65). "There was some delay in receiving the contracts—I did call Rutger Bleecker and asked them if there was any way to speed up the contracts as the goods had been resold" (Trans. p. 65).

Further, Cotton on September 17, 1918, wrote Ozmo that it would offer the material for sale (Trans. p. 69); and on September 30th wired that it had been sold to responsible buyers (Trans. 49) and on October 3rd, wrote Ozmo that it had been resold (Trans. p. 72) and on October 8th wrote Ozmo that it had been sold to the Standard Oil Co.

and Mitsui (Trans. p. 73). And the contract was not made until October 14th.

“If at the time of making the contract, the seller knows that the buyer buys the goods with the intention and for the purpose of reselling them, altho he may or may not know of any particular subcontract existing or contemplated, the inference is that the seller contracts to be liable for the increased damage which will flow from a breach of the contract under the special circumstances and applying the second part of the rule laid down in *Hadley v. Baxendale* those damages may be readily supposed to be within the contemplation of the parties.”

Benjamin on Sales, 6 Ed. 879.

In *Booth v. Spuyten Dyvil Co.*, 60 N. Y. 487 at 494, plaintiff had resold and had so informed defendant. Plaintiff was allowed profits he would have made. The Court said:

“But the mere fact that the vendor does not know the precise market price specified in the contract will not exonerate him entirely. It is only requisite that the parties should have such knowledge of special circumstances affecting the question of damages as that it may fairly be inferred that they contemplated a particular rule or standard for estimating them and entered into the contract upon that basis”.

It is not necessary for the seller to have knowledge of the price to be received by the buyer.

24 R. C. L. 81;

Guetzkow v. Andres, 52 L. R. A. 209 (Wis).

“It is well settled that, in order to satisfy the requirement of notice to the vendor that the vendee is buying for the purpose of reselling,

it is only necessary to prove such purpose of resale, and that the recovery of profits thereon was within the contemplation of the parties to the contract at the time of its execution. Expected profits may be recovered where it was fairly within the contemplation of both parties that the goods were purchased with a view to a resale for profit”.

Howard v. Wells, 176 Fed. 512;

Armeny v. Madsen & Buck Co., 111 Ill. App. 621.

“All that seems to be required is that sufficient information of such special circumstances be given by the one to the other so that the latter may be put on reasonable inquiry concerning them”.

Blue Grass C. Co. v. Luthy, 33 S. W. 835.

“Sufficient information of the special circumstances must be given to the seller to put him on reasonable inquiry concerning them”.

Lunan v. Pa. R. R., 24 N. Y. Sup. 824.

The burden of proof that the damages by the vendee could have been prevented is on the vendor.

“The burden of proving that the damages sustained by the vendee could have been prevented or mitigated by the latter’s action rest upon the vendor as the party guilty of the breach of the contract.”

Howard v. Wells, 176 Fed. 512 at 516.

In *Pac. Sheet Metal Wks. v. Cal. Canneries*, 164 Fed. 980 (C. C. A. 9th Ct.), the Pacific Sheet Metal Works agreed to deliver cans and was delayed by

tin not arriving from England due to storms—profits that might have been made in the canning business were allowed.

Where the purchaser bought to sell again and had made a contract for resale at a profit when the seller refused to make further delivery the measure of damages is the profit that would have been made.

Kaye v. Eddystone, 250 Fed. 654.

Where defendant broke a contract to furnish motor cars to a dealer for resale tho the dealer had made contracts for the sale of more than half the cars it was to receive and could have readily disposed of the remainder, the profits on resale were so reasonably certain as to be recoverable as damages.

Northwestern Auto Co. v. Harmon, 250 Fed. 832 (9th C. C. A.).

In *Messmore v. N. Y. Shot Co.*, 40 N. Y. 422, defendants had agreed to deliver merchandise to plaintiff with knowledge that the latter had agreed to deliver like merchandise to a purchaser and failed to perform. Held that the difference between the price plaintiff was to give and that which he was to receive was properly recoverable as damages. The Court said:

“The rule, however, is changed when the vendor knows that the purchaser has an existing contract for resale at an advanced price and that the purchase is made to fulfill such contract and the vendor agrees to supply the

article to enable him to fulfill the same, because the profits which would accrue to the purchaser upon the fulfilling of the contract of resale may justly be said to have entered into the contemplation of the parties in making the contract”.

In *Lapp v. Ill. Watch Co.*, 104 Ill. App. 255, plaintiff showed that at the time he contracted with defendant for goods he had orders for sale of same, and if goods had been delivered as agreed he would have made a profit on such goods or orders. Plaintiff was allowed such profits.

“If the seller knows that the purchaser has existing contracts for resale and the contract is made in contemplation of such resale, the buyer may recover as damages the profits he loses by reason of the breach”.

35 Cyc. 645;

Hubbard v. Rowell, 51 Conn. 423;

Van Arsdale v. Rundel, 82 Ill. 63;

Wolders v. Veltman, 83 S. W. 224 (Texas);

Anderson v. Kleburne, 27 S. W. 504 (Tex.).

Contract for harrows made with reference to season's trade—lost profits allowed:

Harrow Spg. Co. v. Whipple, 30 Am. St. Rep. 421 (Mich.);

Ellis v. Miller, 58 N. E. 516 (N. Y.);

Imperial Coal Co. v. Port Royal C. Co., 138 Pa. St. 45;

Jordan v. Patterson, 35 Atl. 521 (Conn.);

Borries v. Hutchinson, 114 E. C. L. 443.

Where defendant contracted to furnish fire extinguishers and refused to fulfill, he was held liable for profits on the machines actually sold.

Kenney v. Knight, 127 Fed. 403 (C. C. A.).

“If the plaintiff can show the profits he claims were reasonably certain to be realized by him if the contract had been fulfilled and also that the defendant was at fault in not fulfilling the same, he may recover such reasonable profits”.

Trego v. Arave, 116 Pac. 119 (Idaho);

Johnson v. Faxon, 52 N. E. 539 (Mass.);

Shoemaker v. Acker, 116 Cal. 239;

Lilly v. Lilly, 81 Pac. 852 (Wash.);

Sutton v. Wanamaker, 95 N. Y. Supp. 525.

In McConnell v. Corona City Water Co., 149 Cal. 60, an action for damages, the Court said on page 66:

“Where the loss of profit can with reasonable certainty be shown, both as to the fact and as to the amount, such loss of profits is properly an element of damage.”

In Walsh v. Standart. 174 Cal. 807, an action for breach of contract to cut and sell standing timber. Allegation of performance by plaintiff and refusal to perform by defendant. Evidence showed a continued demand by plaintiff for the proper performance of the contract. The Court said at page 812:

“Considering the amount of timber to be cut under the contract, the testimony as to the market value of the same, and the probable profit to be made by the plaintiff, it cannot be said that the amount of damages awarded is without substantial support in the evidence”.

In this case, Cotton was continually demanding delivery between Nov. 19, 1918, and Feb. 17, 1919. See: Nov. 19 (Trans. p. 82); Nov. 29 (Trans. p. 84); Dec. 2 (Trans. p. 85); Dec. 5 (Trans. p. 86); Dec. 7 (Trans. p. 87); Dec. 9 (Trans. p. 88); Dec. 11 (Trans. p. 91); Dec. 17 (Trans. p. 92); Dec. 19 (Trans. p. 93); Dec. 28 (Trans. p. 94); Jan. 6, 1919 (Trans. p. 94); Jan. 9 (Trans. p. 95); Jan. 17 (Trans. p. 97); Feb. 8 (Trans. p. 103); Feb. 17 (Trans. p. 105).

Lost profits were also allowed in the following:

Connell v. Higgins, 170 Cal. 541 at 549;

Bryson v. McCone, 121 Cal. 153 at 159;

Pac. Co. v. Packers, 138 Cal. 632 at 638;

Robinson v. Respin, 33 Cal. App. 536.

Plaintiff in error argues that no mention was made of the market in which the wax had been sold nor that the resales had been made at a profit and that therefore, defendant in error should not have recovered. We have pointed out that it was not necessary to have given such information and that sufficient information was furnished to put the seller on inquiry. Referring to the cases cited by plaintiff in error on this point (plaintiff's brief, pp. 26-28) examination of them will show that they do not conflict with the cases cited in our brief.

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540; 47 L. Ed. 1171, went off on a question of pleading, and the Court said:

"It does not allege the conclusion of fact so definitely that it must be assumed to be true."

In *Setton v. Eberle-Allbrecht Flour Co.*, 258 Fed. 905, there was no allegation of special damage (as there is here) and the buyer failed to recover.

In *Rohm v. Deig*, 23 N. E. 141, defendant did not properly plead the loss of profits.

In *Wappoo Mills v. Commercial Guano Co.*, 18 S. E. 308, no notice of resale was given and hence no profits allowed.

In *Huggins v. S. E. Lime and Cement Co.*, 48 S. E. 933, the same rule was applied.

In *Alabama Chemical Co. v. Geiss*, 39 Southern 255, defendant failed to deliver lumber contracted for to build a factory. Held that the loss of profits in manufacturing were too remote.

In *Righten v. Clark*, 60 Atlantic 741, wholesale coal dealer sold to retailer. Fact that retailer bought to sell at a profit held insufficient to hold wholesaler for lost profits.

The foregoing cases do not sustain counsel's contention, while the cases which we have cited fully sustain our contention that under the facts shown in this case profits on the resale are recoverable.

"It is not required that he must have exact knowledge or information in detail as to just what loss will result, nor is it always essential that such special conditions be mentioned in the negotiations or included in the contract in express terms. It is sufficient if they are known to the parties or are of such a character that they may be fairly supposed to have been in contemplation in the making of the contract".

8 Ruling Case Law, p. 461 (and cases there cited).

POINT III.

**IT WAS NOT THE DUTY OF COTTON & COMPANY TO PURCHASE
IN THE OPEN MARKET WHEN OZMO FAILED TO DELIVER
THE WAX BECAUSE OZMO NEVER NOTIFIED COTTON THAT
IT COULD NOT OR WOULD NOT DELIVER IT.**

Cotton testified, "Ozmo had promised us continuously that they would make delivery" (Trans. p. 39). "Their attitude at all times was they would make delivery as soon as they could get it and they kept promising us that we could expect delivery in a short time, sometimes they said we will be able to deliver on stipulated date" (Trans. p. 40).

"Q. Did you attempt to buy any of this wax on the market?

A. We made enquiry but did not dare make purchases in view of the fact that they insisted they were going to compel us to take delivery of this wax which they claimed all the time they could furnish" (Trans. p. 40).

Ozmo wired November 21, "Will notify you of shipment" (Trans. p. 83); November 30, "Will ship last of December" (Trans. p. 85); December 7, "Shipment will be made on or before December 23" (Trans. p. 87); December 9 "Give us shipping instructions" (Trans. p. 90); December 19 "Wax will leave refinery about December 28" (Trans. p. 94); "January shipment will be made between January 20th and 30th" (Trans. p. 94); January 7, 1919 (Trans. p. 95); January 13 (Trans. p. 96), January 14, "By February 15 we will be prepared to ship

you the white wax" (Trans. p. 97); January 16 (Trans. p. 97); January 20 (Trans. p. 98); January 22 (Trans. p. 99); January 30, "We are advised that the Utah Oil Refining Co. can positively ship before January 31st" (Trans. p. 100); February 5, "Utah have 30 tons loaded, can furnish balance as per our wire January 30th" (Trans. p. 101); February 17 (Trans. p. 105).

Ozmo from November 21, 1918, to February 17, 1919, were continually advising Cotton that the wax would be shipped. Naturally Cotton was afraid to go into the market and buy, since Ozmo was insisting on its ability and willingness to fill the contract. Under these circumstances Cotton was under no legal obligation to buy in the open market. *Until Ozmo refused to deliver, Cotton was not bound to buy.*

"A party who grounds his complaint on an allegation that the other party was at fault in confiding in his representatives and promises is not entitled to much favor and the burden is upon him to show, at least, from what time the other should have abandoned his faith and set about retrieving his error and minimizing the damages".

Kentucky Dist. Co. v. Lillard, 160 Fed. 34 at 40 (C. C. A.).

"The repeated promises made by plaintiff, and the reliance of defendants upon those promises, have resulted in enlarging the injury they have suffered beyond the probable loss if they had disregarded such promises and taken a different course to save themselves. That the defendants should now have their complaint dismissed be-

cause the damages suffered are greater than they would have been if defendants had not credulously accepted the assurances of plaintiff itself would be a crying injustice”.

Lillard v. Kentucky, 134 Fed. 168 at 179 (C. A.);

Howard Supply Co. v. Wells, 176 Fed. 512 (C. C. A.);

Campfield v. Sauer, 189 Fed. 576 at 580 (C. A.).

Cotton accepted the assurances of Ozmo that it would deliver the wax and now Ozmo says we should not have relied on their promises. Such a plea is entitled to no consideration in this Court.

In Benton v. Fay. 64 Ill. 417, defendant failed to furnish a machine and it was held that the vendee could hold the vendor liable for so long a time as was reasonably necessary to supply himself with another machine of similar character, *after being advised of the defendant's refusal to send the machine sold to him.*

“Before defendant in an action for breach of contract for the sale and delivery of lumber of a particular kind for which there is no market at the time and place of delivery, can be allowed to show that lumber of that kind might have been obtained by the plaintiff at other places, it must show not only that lumber of that particular kind could have been obtained but also that *plaintiff had sufficient time after notice that defendant would not deliver the lumber and before the time specified for its delivery to purchase the same and get it to the place where delivery was to be made, and evi-*

dence that such lumber could have been procured at other places in the absence of such showing is inadmissible.”

Cockburn v. Ashland L. Co., 12 N. W. 49 (Wis.).

Delivery was to be made to Mitsui and Co. in November and December, 1918 (Trans. p. 109) and to the Standard Oil Co. each month beginning January, 1919 (Trans. pp. 36-38). No deliveries were ever made.

Referring to the cases cited by plaintiff on this point in his brief, pages 29 and 30:

In Creve Coeur Lake Ice Co. v. Tamm, 90 Mo. App. 189; seller refused to deliver ice on contract and buyer bought it in open market and was allowed damages.

In Armeny v. Madson & Buck Co., 111 Ill. App. 621, contract for pens. Held duty of buyer to purchase in open market when seller failed to deliver, but he could not obtain them and was allowed profits. Court said at page 624:

“Appellants knew when they sold the pens to appellee that it was its intention to sell them again and at a profit. That is what it was in business for and the object for which it bought them. Appellants must therefore be regarded as having contemplated resales by appellee at a profit”.

In Consolidated Coal Co. v. Mexico Fire Brick Co., 66 Mo. Appeals, 296. Coal contract. Sellers were unable to procure cars. Held duty of buyer to purchase coal in open market.

In *Kinports v. Breon*, 44 Atlantic, 436, there was no element of lost profits and the usual rule of damages applied.

Plaintiff in error has failed to cite a single case where the seller was insisting on his ability to deliver.

They are all cases where the seller had refused or was unable to deliver. We contend that the rule in our case does not apply because *until Ozmo refused to deliver, Cotton was under no duty to buy in the open market*. Further, Ozmo kept promising delivery from November to February, and is estopped by such acts in saying that Cotton should have bought in the open market.

A vendee is not bound to go into the market and procure other goods until the vendor has given him notice that he will not fulfill the contract.

When a refusal to perform is a wrong, he has a right to expect that when the time comes a wrong will not be done.

2 Sutherland on Damages, 4th Ed., p. 2289.

In *Shouse v. Neiswaanger*, 18 Mo. App. 236, at 250, the Court said,

“We find no proof that the plaintiff had any notice that the defendant would not perform its contract until it made default—until they have notice to the contrary the plaintiff might well rely on the contract with the defendant to obtain the deals.”

POINT IV.

THERE ARE NO EXCEPTIONS IN THE BILL OF EXCEPTIONS. EXCEPTIONS TAKEN SUBSEQUENT TO THE TRIAL ARE TOO LATE. THEY MUST BE TAKEN AT THE TRIAL BEFORE THE CASE IS FINALLY SUBMITTED SO THAT THE TRIAL JUDGE'S ATTENTION IS CALLED TO THE ERROR AND HE IS GIVEN AN OPPORTUNITY TO CORRECT IT.

“The findings as made must stand if there is any substantial evidence to sustain them; and whether there was such evidence could be made reviewable on writ of error only by presenting a request to the trial court, either to make some declaration that there was no evidence to support a finding adverse to the party making the request or to render a judgment in his favor on the ground that there was no such evidence and upon refusal of the court so to do, *taking proper exception* and assigning error thereon. There having been no request in this case for any such declaration of law in any form and *no exception taken* or error assigned to the court's action, therefore the findings of facts, even if it was such, cannot be challenged”.

Gibson v. Luther, 196 Fed. 203;

Felker v. Bank, 196 Fed. 200.

It must be shown from the record that the party objected at the trial to the rulings and *had the exception noted* and reduced to a bill and that the party persisted in them.

Mexico Intl. Co. v. Larkin, 195 Fed. 495;

Northern Idaho & Mont. P. Co. v. A. L. Jordan, 262 Fed. 765 (9th C. C. A., Gilbert, J.).

POINT V.

PLAINTIFF IN ERROR IS MERELY ATTACKING FINDINGS OF FACT MADE BY THE COURT BELOW. THESE ARE AS FOLLOWS:

a. That the contract was not made on October 14, 1918, as found by the Court but on August 30, 1918.

b. That the notice of resale was insufficient to bring into play the rule of loss of profits as damages.

c. That upon the failure of Ozmo to deliver the wax, it was the duty of Cotton to minimize the damages by purchasing wax in the open market.

a. The Court found that the contract was made on October 14, 1918. The evidence on this point is as follows:

Cotton's testimony: "We received the contract in its final form, October 14, 1918" (Trans. p. 41).

Cotton to Ozmo October 12, 1918: "We have since received the contract" (Trans. p. 82).

Leon's testimony: "There was an agreement drawn up in writing and which was submitted to us and modified by Ozmo before we had signed it. The original was returned to them, was rewritten and a new contract submitted" (Trans. p. 60). "Ozmo forwarded a contract which they themselves had not signed, making no mention of a letter of credit and we made minor corrections with reference to the quantity, eliminating the vagueness of quantity mentioned, and then returned it to them

and then received their demand for a letter of credit" (Trans p. 63).

Letter of Ozmo to Cotton October 10, 1918, explaining delay in execution of contract: "Therefore we drew new contract, etc." (Trans. pp. 77- 78- 79).

b. Objection that the notice was insufficient.

The Court found "That prior to the execution and delivery of said agreement—defendant knew that plaintiff was about to purchase the wax—for resale and had resold the same" (Trans. p. 20).

The evidence of such notice: Leon told Ozmo's brokers (Trans. p. 58, last line, and p. 59). Letters and telegrams, Cotton to Ozmo set forth on page of this brief and set forth at pages 69- 72- 73 of the transcript. It will be seen from the foregoing that there was some evidence to sustain the findings and our contention is that these findings of fact cannot be disturbed.

"When a case is tried by the court without a jury, its findings on questions of fact are conclusive, altho open to the contention that there was no evidence on which they could be based. The question remains whether or not the facts found are sufficient to support the judgment and *rulings to which exceptions are duly reserved* may be reviewed".

Ward v. Joslin, 186 U. S. 142 at 147; 46 L. Ed. 1093.

"Where the case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that

upon the evidence the findings should have been different”.

Dooley v. Pease, 180 U. S. 126 at 131; 45 L. Ed. 457;

Stanley v. Albany Co., Supr., 120 U. S. 547;
30 L. Ed. 1002.

“Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals or by this court, if there was any evidence upon which such findings could be made”.

Dooley v. Pease, 180 U. S. 126;

Hathaway v. First Natl. Bank, 134 U. S. 494;
33 L. Ed. 1004;

Runkle v. Burnham, 153 U. S. 216; 38 L. Ed. 694.

CONCLUSION.

The Court below found, upon the evidence submitted:

That the contract of purchase was made October 14, 1918.

That the seller was notified prior to October 14th that the wax had been resold.

That the defendant in error was under no duty to buy in the open market—because Ozmo never notified it that it would not fulfill the contract.

It appears that there are no exceptions in the record.

It is respectfully submitted that the judgment be affirmed.

Dated, San Francisco,
October 17, 1921.

WILLARD P. SMITH,
Attorney for Defendant in Error.

United States
Circuit Court of Appeals

For the Ninth Circuit.

DOUGLAS FIR EXPLOITATION & EXPORT
COMPANY, a Corporation,

Plaintiff in Error,

vs.

W. LESLIE COMYN and BENJAMIN F. MACK-
ALL, Copartners Doing Business Under the
Firm Name of COMYN, MACKALL & COM-
PANY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED
SEP - 7 1921
F. D. MONCKTON,
CLERK.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. PILLSBURY, MADISON & SUTRO,
Standard Oil Building, San Francisco, Cali-
fornia,

Attorneys for Plaintiffs.

Messrs. CHICKERING & GREGORY and Messrs.
McCLANAHAN & DERBY, Merchants Ex-
change Building, San Francisco, California,

Attorneys for Defendant.

In the Southern Division of the District Court of
the United States for the Northern District of
California, Second Division.

No. 16,127.

W. LESLIE COMYN and BENJAMIN F. MAC-
KALL, Copartners Doing Business Under
the Firm Name of COMYN, MACKALL &
CO.,

Plaintiffs,

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiffs complain of defendant, and for cause of
action allege:

2 *Douglas Fir Exploitation & Export Company*

I.

The plaintiffs are, and at all the times herein mentioned were, copartners doing business under the firm name of Comyn, Mackall & Co., and plaintiff Benjamin F. Mackall is, and at all the times herein mentioned was, a citizen of the state of California and a resident of the Southern Division of the Northern District of California, and plaintiff W. Leslie Comyn is, and at all the times herein mentioned was, a citizen of the United Kingdom of Great Britain and a resident of the Southern Division of the Northern District of California.

II.

Douglas Fir Exploitation & Export Company is, and at all the times herein mentioned was, a corporation organized and existing under the laws of the State of Washington, and a citizen and resident of said State.

III.

On, to wit, November 2, 1916, plaintiffs and defendant [1*] entered into a written contract for the purchase and sale of lumber, in manner as follows: Defendant wrote to plaintiffs a letter as follows, to wit:

*Page-number appearing at foot of page of original certified Transcript of Record.

“DOUGLAS FIR EXPLOITATION & EXPORT
CO.,

260 California Street.

San Francisco, Cal., November 2, 1916.

Messrs. Comyn, Mackall & Co.,

310 California St.,

City.

Sold prior to October 11, 1916.

Gentlemen:—

This will confirm sale to you of four cargoes Fir
F.A.S. mill wharves as follows:

‘W. H. Marston’ 1300 M October to December, 1917.

‘W. H. Talbot’ 1000 M “ “ , 1917.

‘W. H. Talbot’ 1000 M “ “ , 1917.

(Quotations subject to change without notice.

All agreements are contingent upon the acts of
God, riots, strikes, lock-outs, fires, floods, acci-
dents, inability to secure cars, transportation or
other causes of delay beyond our control.)

and two of your own vessels to be named later, with a
combined capacity of 1450 M, both for loading Octo-
ber to December, 1917, cargo to be furnished F.A.S.
vessel at loading ports at 60 M daily in Puget Sound,
Columbia or Willamette Rivers, Gray’s Harbor and
Willapa at our option, but one loading port only for
each vessel, loading port to be named by us in ample
time to give vessel instructions before leaving her
next previous port of call.

Tally and inspection by Pacific Lumber Inspection
Bureau at loading port; Certificate to be furnished
and to be final. Price \$9.50 base ‘G’ list less 2½%,

4 *Douglas Fir Exploitation & Export Company*

21½% cash. Marking if required, distinguishing mark at 10¢ per M. extra cost.

Written in duplicate. Please approve and return one copy.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EX-
PORT COMPANY,

By A. A. BAXTER,
General Manager.

AAB-D.”

Thereupon plaintiffs endorsed on one copy of said letter their written approval and confirmation thereof and delivered said copy so approved and confirmed to defendant. [2]

IV.

On December 15, 1916, defendant notified plaintiffs that it would deliver the 1,300,000 feet of “Fir” specified in said contract as a cargo for the “W. H. Marston” at the mill wharf of the Knappton Mill & Lumber Company, at Knappton, Washington, which said wharf is situated on the Columbia River. On said 15th day of December, 1916, defendant sent plaintiffs an instrument entitled “Acknowledgment of Order,” in words and figures as follows, to wit:

ACKNOWLEDGMENT OF ORDER.

“Douglas Fir Exploitation & Export Co.,
260 California St.,
San Francisco, Cal.

Date December 8, 1916.

Our No. 38, page 1.

Your Order No. —.

Dated —.

Knappton Mills & Lumber Company.

Sold to—Comyn, Mackall & Company.

For account of—

To be delivered at—Knappton, Wash.

For reshipment to—

Time of shipment—October to December, 1917.

Time of delivery— do

Mill tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lockouts, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per this confirmation irrespective of original order unless advised to the contrary by you.

SCH. ‘W. H. MARSTON.’

1,300,000 feet B. M. 15% more or less to suit capacity of vessel.

PRICE: \$9.50 Base ‘G’ List, Less 2½% & 2½% for cash.

DESTINATION: Australia. (Usual Australian Specifications.)

6 *Douglas Fir Exploitation & Export Company*

GRADE: As per "G" List, P.L.I.B. Certificate to be furnished.

DELIVERY: 60 M feet per working day or pay demurrage as provided by Charter-party.

MARKING: Marking if ordered, 10 cents per M, Net Cash. [3]

SHIPMENT: October to December, 1917.

TERMS AND CONDITIONS: As per 'G' List.

NOTES: This price is for delivery F.O.B. Mill Wharf, Knappton, within reach of vessel's tackles and/or on barges A.S.T. Mill Wharf, Knappton, Wash."

and defendant on said 15th day of December, 1916, requested plaintiffs to sign their acceptance of said order, and thereupon plaintiffs signed their acceptance of said order and forthwith forwarded said signed acceptance of said order to defendant.

V.

That the figures and letter 1300 M mean, and were at all the times herein mentioned understood by plaintiffs and defendant to mean, 1,300,000 feet.

That the phrase f. a. s. mill wharf means, and at all the times herein mentioned was understood by plaintiffs and defendant to mean, free alongside mill wharf.

That the phrase f. o. b. mill wharf means, and at all the times herein mentioned was understood by plaintiffs and defendant to mean, free on board mill wharf.

That the phrase on barges a. s. t. mill wharf means, and at all the times herein mentioned was understood by plaintiffs and defendant to mean, on barges at ship's tackle mill wharf.

That the phrase "G" List means, and at all the times herein mentioned was understood by plaintiffs and defendant to mean, a certain schedule of lumber prices published by Pacific Lumber Inspection Bureau, Inc., for the purpose of furnishing a basis for the quotation of prices, and by said Bureau designated as "G" List. A copy of said "G" List is hereunto attached as Exhibit "A." [4]

VI.

On October 23, 1917, plaintiffs notified defendant that on November 25th, 1917, they would take delivery of said 1,300,000 feet of "Fir" in accordance with the terms of said contract at the wharf specified by defendant.

VII.

On November 25, 1917, plaintiffs were ready, willing and able to take delivery of said lumber according to the terms of said contract, at the place specified by defendant, and prepared to take delivery thereof and had barges and stevedores present on said day at said place to so take delivery, and plaintiffs on said day had performed, and have ever since performed, all the conditions required of plaintiffs by said contract prior to and for the delivery of said lumber to plaintiffs.

VIII.

Defendant, however, failed and refused to deliver said 1,300,000 feet of "Fir," or any part thereof, at said wharf, to plaintiffs on said day, or on any other day, and notified plaintiffs that it would not deliver said 1,300,000 feet of "Fir," or any part thereof to plaintiffs at said wharf, and ever since

said day has failed and refused, and does now refuse, to deliver to plaintiffs said 1,300,000 feet of "Fir," or any part thereof, free on board said wharf, or on barges free alongside said wharf.

IX.

Plaintiffs expended the sum of Three Hundred and Four Dollars (\$304) in preparing to take delivery of said lumber as above set forth.

X.

On December 7, 1917, defendant purchased 1,300,000 [5] feet of "Fir" at the price of \$22.50 net Base "G" List, said "Fir" to be delivered f. a. s. mill wharf on the Columbia River. Said purchase price was, at the time of said purchase, a reasonable price for said "Fir," and was at said time the prevailing market price in San Francisco of "Fir" for delivery f. a. s. or f. o. b. mill wharf, and/or on barges a. s. t. mill wharf at the loading ports in Puget Sound, Columbia or Willamette Rivers, Grays Harbor or Willapa, and was also at said time the prevailing market price of "Fir" at said loading ports.

XI.

The difference between the contract price of said "Fir" and the price finally paid by plaintiffs, as in the foregoing paragraph set forth, is the sum of Seventeen Thousand Five Hundred and Eleven Dollars (\$17,511), and by the failure of defendant to deliver said lumber to plaintiffs, plaintiffs have been damaged in the sum of Seventeen Thousand Eight Hundred and Fifteen Dollars (\$17,815).

WHEREFORE, plaintiffs pray judgment against

defendant in the sum of Seventeen Thousand Eight Hundred and Fifteen Dollars (\$17,815), together with interest on said sum from December 7, 1917, to date of judgment, and for their costs herein.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiffs. [6]

State of California,
City and County of San Francisco,—ss.

W. Leslie Comyn, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

W. LESLIE COMYN.

Subscribed and sworn to before me this 26th day of December, 1917.

[Seal]

ANNE F. HASTY,

Notary Public in and for the City and County of
San Francisco, State of California. [7]

[Endorsed]: Filed December 27, 1917. W. B.
Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

(Title of Court and Cause.)

Demurrer to Complaint.

Now comes the Douglas Fir Exploitation & Export Company, a corporation, defendant herein, and

demurs to the complaint on file herein and for grounds of demurrer shows:

I.

That said complaint does not state facts sufficient to constitute a cause of action against defendant.

II.

That said complaint is uncertain for the following reasons:

(a) It shows that the sole means provided by plaintiff for accepting delivery of the lumber was a barge, while it appears from the contract declared on that the lumber was to be delivered to a sailing ship, the "W. H. Marston," alongside the wharf of a mill to be named by the defendant.

(b) It does not show that the "W. H. Marston," named in the contract as the receiving vessel, was at the named loading port on the 25th day of November, 1917, or at any other time, and, therefore, delivery of the lumber could not have been made or tendered free alongside the wharf of the loading mill, but, on the contrary, the allegations of said complaint show that plaintiffs' preparedness to take delivery was at a place not contemplated or called for by the contract.

(c) It does not show the relevancy of defendant's alleged refusal to deliver "free on board said wharf or on barges from alongside said wharf," as such refusal would not constitute a breach of the contract, which calls for a delivery at the tackles of the schooner "W. H. Marston," either from barges alongside the mill wharf or from the mill wharf itself.

(d) It appears from the contract that it was the agreement [8] of the parties that the lumber sold was for immediate export after its delivery to the schooner, and, therefore, the allegation of plaintiffs' readiness to accept delivery on a barge or barges is a clear refutation of the agreement that the lumber was sold for immediate export.

(e) It does not show a readiness on plaintiff's part to accept delivery alongside the mill wharf of the Knappton Mill & Lumber Co., within reach of the tackles of the schooner "W. H. Marston," and/or from barges alongside said mill wharf within reach of said schooner's tackles, during some or any portion of the agreed period for delivery.

(f) It does not show a readiness to accept delivery of said lumber on the schooner "W. H. Marston," although the contract shows that the price for the lumber was based on defendant's right to make a delivery within reach of the vessel's tackles, either from the mill wharf or from barges alongside.

(g) That in alleging a willingness and readiness to accept delivery of the lumber on a barge or barges, and in thereby assuming to substitute such barge or barges for the schooner "W. H. Marston" without defendant's consent, plaintiffs would deprive the loading mill of the benefit of the certificate called for, under and by which such loading mill would be relieved from responsibility for impairment of the lumber's condition, or otherwise, occurring in its export.

(h) It appears that the presence of the schooner "W. H. Marston" alongside the wharf of the Knappton Mill & Lumber [9] Co. on the Columbia River, so that delivery could be made at the schooner's tackles, either from said wharf or from barges alongside, at defendant's option, was a condition precedent to any delivery by defendant, and the complaint does not show a compliance with said condition precedent.

(i) It is shown that the understanding of both parties to the contract was that the lumber was for immediate export after delivery, and that the delivery itself was intended to be of such character as to constitute one of the initial steps in the lumber's export, and, therefore, the allegation of plaintiff's readiness and willingness to accept delivery on a barge or barges shows an attempted violation of a material condition of the contract.

(j) It does not show that the schooner "W. H. Marston" was alongside the wharf of the Knappton Mill & Lumber Co. on the Columbia River on November 25th, 1917, or at any other time.

(k) It does not show where plaintiffs were ready to accept delivery of said lumber on November 25th, 1917.

III.

That said complaint is ambiguous and unintelligible for each and all of the reasons for which it is herein alleged and shown to be uncertain.

WHEREFORE, defendant prays that said complaint be dismissed and that it may have its costs herein.

Dated January 22d, 1918.

McCLANAHAN & DERBY,
Attorneys for Defendant.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law, and that it is not [10] interposed for purposes of delay.

McCLANAHAN & DERBY,
Attorneys for Defendant.

Receipt of a copy of the within Demurrer to Complaint is hereby admitted this 22d day of January, 1918.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiffs.

[Endorsed]: Filed January 22d, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[11]

At a stated term, to wit, the July term, A. D. 1918, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 21st day of October, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,127.

W. LESLIE COMYN et al.

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
CO.

(Order Overruling Demurrer.)

Defendants' demurrer to complaint, heretofore submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that said demurrer be and the same is hereby overruled.
[12]

(Title of Court and Cause.)

Answer to Complaint.

Now comes the defendant in the above-entitled cause and answering the complaint herein admits, denies and alleges as follows, to wit:

I.

Answering the allegations contained in paragraph I of said complaint, defendant admits the same.

II.

Defendant admits the allegations contained in paragraph II of said complaint.

III.

Answering the allegations of paragraph III, defendant admits that on November 2d, 1916, it wrote to plaintiffs the letter, a copy of which is set forth in said paragraph; it admits that plaintiffs endorsed on a copy of said letter their written approval and

that they delivered said copy with such endorsed approval to defendant. But in this connection defendant alleges that plaintiffs' said written approval of said letter was delivered to defendant enclosed in a letter from plaintiffs, dated November 6th, 1916, and not before.

IV.

Answering the allegations of paragraph IV of said complaint, defendant denies that on December 15th, 1916, it notified plaintiffs that it would deliver the 1,300,040 feet of "Fir" specified in said contract as a cargo for the "W. H. Marston" at the mill wharf of the Knappton Mills and Lumber Company at Knappton, Washington; it admits that the mill wharf of the Knappton Mills and [13] Lumber Company is situated on the Columbia River; it admits that on the 15th day of December, 1916, it sent to plaintiffs the instrument set forth in said paragraph IV, entitled "Acknowledgment of Order," and in this connection defendant alleges that said "Acknowledgment of Order" was sent to plaintiffs, enclosed in a letter dated December 15th, 1916, informing plaintiffs that the cargo for the Schooner "W. H. Marston" had been placed with the Knappton Mills and Lumber Company, at Knappton, Washington, and requesting them to sign the acceptance copy of the order and return same for defendant's files. It admits that thereupon plaintiffs signed their acceptance of said order and forthwith forwarded same to defendant.

V.

Answering the allegations of paragraph V of said

complaint, defendant admits that the figures and letter "1300 M" mean, and were at all times intended and understood by both plaintiffs and defendant to mean, 1,300,000 feet.

Defendant denies that the phrase "f. a. s. mill wharf" means free alongside mill wharf; it denies that the phrase "f. o. b. mill wharf," as used in the instrument set forth in said paragraph IV, means free on board mill wharf; it denies that said last two phrases were understood by the parties at said or any time to mean as alleged in said complaint. In this connection defendant alleges that the phrase "f. a. s." is a commercial term, known and commonly used in commercial transactions requiring shipments by water, and means free alongside ship, and that such was the understood meaning of said phrase by both plaintiffs and defendant, in its use in the instrument set forth in paragraph III of said complaint. Furthermore defendant alleges that the use of the phrase "f. a. s. Mill Wharves," in the instrument referred to in said paragraph III, was understood by both plaintiffs and defendant to require the actual presence, at a mill wharf, to be designated by defendant, of a [14] sailing vessel to receive at her tackles, delivery of the cargo of fir agreed to be sold. Furthermore defendant alleges, that in contracts for the sale of cargoes of lumber to be delivered "f.a.s. mill wharf," at a specified time, a custom of the trade requires the actual presence at the designated mill wharf of a vessel to take delivery at her tackles at such specified time, of the cargo of lumber, and that such custom was known to both plaintiffs and

defendant at the time the contract sued on herein was entered into, and was a general custom among buyers and sellers and shippers of lumber, in cargo lots, in the City and County of San Francisco, State of California, and generally in the Pacific Coast ports of the United States.

Further answering the allegations of said paragraph V, defendant admits that the phrase "on barges a. s. t. mill wharf" means, and at all times was understood by plaintiffs and defendant to mean, on barges at ship's tackles mill wharf.

Defendant denies that the phrase "G" List means, or was understood by both plaintiffs and defendant to mean, a certain schedule of lumber prices published by the Pacific Lumber Inspection Bureau, Inc., for the purpose of furnishing a basis for the quotation of prices; it admits that Exhibit "A" attached to said complaint is a copy of said "G" List, and in this connection and also as a separate answer and defense to this action, defendant alleges as follows:

That said "G" List is a standard schedule solely of prices of Douglas Fir lumber, bargained for or sold to be exported only, and that said "G" List furnishes the basis for the quotation of prices for Douglas Fir for export shipment only, to be delivered only to vessels at lumber mills within reach of such vessel's tackles, and defendant alleges that at all times mentioned, in said complaint, said "G" List was so known and understood by both plaintiffs and defendant. . [15]

Defendant further alleges that among the terms

and conditions of said "G" List which were understood and accepted by both plaintiffs and defendant as forming a part of the contract sued on herein, is one providing that the prices in said "G" List are based on delivery of the Fir by the seller to sailing vessels, and defendant alleges that the prices in the contract sued on were based solely on delivery of a cargo of fir to the sailing vessel "W. H. Marston," and that this was at all times the understanding and agreement of both plaintiffs and defendant.

Defendant further alleges that another term and condition of said "G" List which was understood and accepted by both plaintiffs and defendant as forming a part of the contract sued on herein, provides and requires that there shall be furnished by the loading mill, on completion of the loading of the fir on the vessel, a certificate of said Pacific Lumber Inspection Bureau, Inc., made and sworn to by a regularly approved inspector licensed by said Bureau, and countersigned by one of the supervisors of said Bureau, certifying, after survey and inspection, to the quantity, character and condition of the shipment, which said certificate was to be accepted as proof of the character and condition of the fir at the port of shipment and was to relieve the loading mill from any responsibility for impairment of condition or otherwise occurring in transit.

Defendant further alleges that said certificate can only be issued after the fir, bargained for and sold, has been actually loaded on a vessel bound for a foreign port, and when issued must contain the name of the exporting vessel as well as the name of the

foreign port to which she is bound with said fir, and that this was known and understood by both plaintiffs and defendant at all times mentioned in said complaint. [16]

Defendant further alleges that said certificate could not be made or issued for fir loaded on a barge or barges, not intended for a voyage to a foreign port, and that this also was known and understood by both plaintiffs and defendant at all times mentioned in said complaint.

Defendant further alleges that another term and condition of said "G" List provides that during the loading of the fir bargained for and sold the supervisor and inspector of the Pacific Lumber Inspection Bureau, Inc., issuing the certificate herein referred to, are required to consider and determine whether the fir so being loaded on the vessel is in such seasoned condition as will work to the dry standards in its size in accordance with the official chart for worked sizes, included in said "G" List, and that this term and condition of said "G" List was understood and accepted by both plaintiffs and defendant as forming a part of the contract sued on herein.

Defendant further alleges that all of said terms and conditions of said "G" list were understood and accepted by both plaintiffs and defendant as forming a part of the contract sued on herein and were terms and conditions which were intended to be and which in fact were for the mutual benefit and protection of both plaintiffs and defendant, and were terms and conditions which neither party to said

contract could waive without the consent of the other.

VI.

Answering the allegations of paragraph VI of said complaint, defendant denies that on October 23, 1917, or at any time, plaintiffs notified defendant that on November 25th, 1917, they would take delivery of 1,300,000 feet of "fir" in accordance with terms of said contract at the wharf specified by defendant; [17] defendant admits that on October 23d, 1917, plaintiffs informed defendant in writing that on November 25th, 1917, they would have barges alongside the mill dock at Knappton, ready to take delivery of 1,300,000 feet of fir.

VII.

Answering the allegations of paragraph VII of said complaint, defendant denies that on November 25th, 1917, or at any other time, plaintiffs were ready, willing or able to take delivery of said lumber according to the terms of said contract, or at all, at the place specified by defendant, and denies that said plaintiffs were prepared to take delivery thereof, at said time or at any time, and denies that plaintiffs had barges or stevedores present on said day, or on any other day, at said or any other place to so take delivery, and denies that plaintiffs on said day, or at all, had performed or have ever since performed all or any of the conditions required of plaintiffs by said contract prior to and for the delivery of said lumber to plaintiffs. In this connection and as a separate answer and defense to the action, defendant alleges that on November 24th, 1917, a

launch towed a barge with a carrying capacity of not exceeding 400,000 feet of lumber to a certain boom in the Columbia River about 75 feet from the mill dock of the Knappton Mills and Lumber Company, and there moored and left said barge; that thereafter and on the morning of November 26th, 1917, a man claiming to be a representative of a certain stevedoring company of the City of Portland, Oregon, arrived at the mill of the said Knappton Mills and Lumber Company, at Knappton, Washington, and handed to a representative of said company, a letter in words and figures following:

“San Francisco, Nov. 6, 1917.

Knappton Mills & Lumber Company,

Agents Douglas Fir Exploitation & Export Co.,

Knappton, Washington. [18]

Dear Sirs:

Please deliver the undersigned mentioned lumber, in good order and condition, to Mr. Henry Rothschild or bearer.

1,300,000' of Douglas Fir purchased from you under contract dated November 2d, 1916, and in accordance with specifications handed you in San Francisco under date September 19th, 1917.

Very truly yours,

COMYN, MACKALL & CO.,

Per J. CLAUDE DALY.

D/W.”

Defendant further alleges as a separate answer and defense to this action, that neither said plaintiffs or anyone representing them at any time brought to or had said, or any barge or barges, at

the mill dock of the Knappton Mills and Lumber Company at Knappton, Washington; that at no time did said plaintiffs or anyone representing them have at said boom in said Columbia River, or at any place adjacent to the mill wharf of said Knappton Mills and Lumber Company, Washington, any barges other than the one herein referred to as having been moored to and left at said boom on said November 24th, 1917, and defendant attaches hereto, marked Exhibit "A," a copy of the specifications referred to in the letter last herein quoted, together with a copy of the letter written by plaintiffs accompanying said specifications, with copy of the bill of lading referred to in said letter and accompanying the same, and asks that the same may be considered as part of its answer and separate defense herein. And defendant alleges in this connection that it was never understood or agreed by plaintiffs or defendant at the time said contract was entered into, or at any other time, that a barge or barges might, at the option of plaintiffs, be furnished and used by plaintiffs in taking delivery of said fir intended for and sold as a cargo to the said schooner "W. H. Marston," but, on the contrary, it was the understanding and agreement of the parties and so expressed in said contract, that the option was given to defendant to make delivery of said cargo at the tackles of the said "W. H. Marston" from either the mill [19] wharf or from barges alongside, or from both said mill wharf and barges, and that this privilege and provision

of the contract was inserted wholly for the benefit of defendant.

And defendant further alleges in this connection that it was and would at all times have been impossible for it to make delivery of a cargo of fir to suit the capacity of the schooner "W. H. Marston," to a barge or barges, unless the capacity of said schooner was known, and defendant alleges that the capacity of said "W. H. Marston" was not known, and could not have been known or ascertained until said fir, in the lengths, breadths and sizes corresponding to the specifications furnished and required by plaintiffs, had been actually loaded on board said schooner "W. H. Marston," and in this connection defendant alleges that by its said contract with plaintiffs it did not obligate itself to do the impossible.

VIII.

Answering the allegations of paragraph VIII of said complaint, except as hereinafter explained and modified, defendant denies that it failed or refused to deliver 1,300,000 feet of "fir" in whole or in part, at said wharf to plaintiffs on said day, or on any other day as alleged; it denies that it notified plaintiffs that it would not deliver 1,300,000 feet of "fir" or any part thereof to plaintiffs at said wharf; it denies that ever since said 25th of November, 1917, it has failed or refused to deliver to plaintiff 1,300,000 feet of fir or any part thereof free on board said wharf or on barges free alongside said wharf. In this connection defendant alleges that it was at all times ready, willing and able to carry out the terms

of the contract for the sale and delivery of the fir set out and bargained for in said contract, and that it in fact did in accordance with said contract, deliver, to the schooner "W. H. Talbot," at her tackles, at a designated mill wharf, the full cargo of "fir" called for in said contract; [20] that in accordance with said contract it delivered to the schooner "Golden Shore," at her tackles, at a designated mill wharf (she being one of the vessels which, as required by said contract, plaintiffs subsequently named), the full cargo of "fir" called for in said contract; that although plaintiffs named, as required by said contract, the schooner "Wm. Borden" as the fourth vessel, the cargo of "fir" contracted for for that vessel was not delivered by defendant at her tackles, or at all, because of the failure of plaintiffs to have the said "Wm. Borden" at the agreed loading berth at the agreed date, and defendant alleges that the contract in so far as it applied to both the schooners "W. H. Talbot" and "Golden Shore" was fulfilled in strict accord with its terms, while that portion of said contract which applied to the schooners "W. H. Marston" and "Wm. Borden" was cancelled by defendant for the same reason, namely, the failure of plaintiffs to have either of said last-named vessels at the designated loading place within the agreed and specified loading time.

Defendant as a further separate answer and defense to this action alleges that the said schooner "W. H. Marston" was never at the mill wharf of the Knappton Mills and Lumber Company, at said

Knappton, Washington, at any time within the period extending from the 1st day of October to the 31st day of December, 1917, inclusive, and as a consequence it was never within the power of defendant and/or the said Knappton Mills and Lumber Company to deliver to said vessel a cargo of "fir" on the mill wharf of said company, free alongside said vessel, or free on board said mill wharf within reach of said vessel's tackles, or on barges at said vessel's tackles at said mill wharf.

IX.

Answering the allegations of paragraph IX of said complaint, [21] defendant not having information or belief sufficient to enable it to answer, it denies on that ground that plaintiffs expended the sum of \$304.00, or any other sum, in preparing to take delivery of 1,300,000 feet of fir, as set forth in said complaint, or at all, and calls for strict proof of said allegation.

X.

Answering the allegations of paragraph X of said complaint, defendant not having information or belief sufficient to enable it to answer, denies on that ground that plaintiffs on December 7th, 1917, or at any other time, purchased 1,300,000 feet, or any other number of feet of fir, at the price of \$22.50 net base "G" List to be delivered f. a. s. mill wharf on the Columbia River; or that said purchase price was, at the time of said purchase a reasonable price for said fir, or was at said time the prevailing market price in San Francisco of "fir" for delivery f. a. s. or f. o. b. mill wharf and/or on barges, a. s. t.

mill wharf at the loading ports of Puget Sound, Columbia or Willamette Rivers, Grays Harbor or Willapa, or that it was also at said time the prevailing market price of fir at said loading ports, and defendant calls for strict proof of said allegations.

XI.

Answering the allegations of paragraph XI of said complaint, defendant not having information and belief sufficient to enable it to answer, denies on that ground that the difference between the contract price of said fir and the price finally paid by plaintiffs is the sum of \$17,511.00, or any sum approximating the same; and defendant denies that by the failure of it to deliver said lumber to plaintiffs, they have been damaged in the sum of \$17,815.00 or any other sum, and defendant calls for strict proof of the allegations of said paragraph. [22]

And for a further and separate answer to said complaint, stated as a whole, and for five (5) further and separate answers to said complaint stated separately in Articles I, II, III, IV, and V following, defendant alleges as follows:

I.

That defendant is a corporation organized under the laws of the State of Washington, for the primary object and purpose of exploiting and increasing foreign trade in, and the use and consumption of Douglas Fir and other Pacific Coast forest products, in the foreign countries of the world only; that no person other than one actually

engaged in the manufacture of lumber on the Pacific Coast is eligible to subscribe for or become at any time a stockholder in same; that the entire stock of said defendant corporation is now and has been at all times since its organization owned or controlled by corporations and individuals owning or controlling a very large percentage of all the Douglas Fir lumber manufactured or produced on the Pacific Coast of the United States; that the Knapp-ton Mills and Lumber Company are, and were at all times mentioned in plaintiffs' complaint, stockholders in defendant corporation; that said defendant corporation was organized on October 11th, 1916, and commenced doing an export business in "fir" on November 1st, 1916, in anticipation of the passage by Congress of the United States of what was and is now known as the "Webb-Pomerene Bill," being the Act of April 10, 1918 (Compiled Statutes, U. S., secs. 8836 $\frac{1}{4}$ a to e, inclusive), permitting the organization of corporations or associations for the sole purpose of engaging in export trade, and being an amendment of what is popularly known as the "Sherman Act" (Act of July 2, 1890, Compiled Statute, U. S., secs. 8820 to 8836, inclusive); that the anticipated early passage of the said "Webb-Pomerene Bill" was postponed and said bill did not finally become law until April 10, [23] 1918; that between the date of November 1st, 1916, and the passage of said "Webb-Pomerene Bill," defendant did business as an exporter only of Douglas Fir with the tacit consent of the Federal Trade Commission (a commission created by act of Con-

gress of September 26th, 1914, Compiled Statute, U. S., secs. 8836a to 8836r, inclusive), which commission on the passage of said "Webb-Pomerene Bill" was given by that law, jurisdiction and supervision over the business and affairs of corporations or associations organized to do an expert business under that law; that all defendant's transactions and all the export business done by it after its organization, and up to the passage of said "Webb-Pomerene Bill" were regularly and duly reported to said Federal Trade Commission, and said commission was kept fully informed at all times of defendant's corporate acts, and especially its sales of Douglas Fir for exportation to foreign countries; that all of the Douglas Fir sold or handled by defendant is, and at all times since its incorporation has been purchased by it from its own stockholders, and under its charter, and also under the laws of the United States, it has no right or power to sell or in any way deal with Douglas Fir except for its export, and that plaintiffs knew and were fully cognizant of the organization of defendant corporation and its primary object and purpose, and were fully cognizant of all the matters and things herein alleged concerning defendant's corporate powers and restrictions, and were especially cognizant of defendant's method of doing business prior to the passage of said "Webb-Pomerene Bill," and were at all times since defendant's incorporation fully cognizant of defendant's inability to sell or deal in any way with Douglas Fir for any purpose except its exportation to foreign countries; that when

the contract sued on [24] herein was entered into, plaintiffs and defendant both knew that defendant could not, because of its charter restrictions and under the law, sell fir to the plaintiffs, or to anyone else, except for export, and it was with full knowledge and understanding of this liability of defendant that the contract sued on herein, specified and required the naming of the exporting vessels which it was agreed and understood said fir should be exported on; that at the time the contract sued on was entered into, plaintiffs knew that it was beyond the legal power of defendant to make delivery of said four cargoes of fir, or any fir, except to exporting vessels, or except in such manner as would assure said fir exportation, and that it was beyond the legal power of defendant to make delivery of fir in any way that would place it within the discretionary power of the plaintiffs to export it; that plaintiffs knew and it was understood by both parties, plaintiffs and defendant, at the time said contract was entered into, that the terms and conditions embodied in said contract touching the question of the exportation of said fir, were each and all of them intended to be safeguards and guarantees that said fir would pass into plaintiffs' possession in such manner as to make it imperative that the same should be exported, and that plaintiffs should be denied the right or power of dealing with said fir in any other way. And defendant alleges in this connection that even though it were possible to make a delivery to a barge or barges of the fir bargained for under the contract between plaintiffs

and defendant, such a delivery to a barge or barges, would place it within the power and legal right of plaintiffs to do with said fir as they might see fit, including the legal right and power of so disposing of said fir thereafter, in such manner as to make defendant's sale a violation of its charter, and of the laws of the United States. [25]

II.

That in the contract sued on herein the term thereof designating a particular known vessel at whose tackles a cargo of fir was to be furnished and delivered was inserted for the benefit of both plaintiffs and defendant and was a requirement of said contract which neither party thereto could waive without the consent of the other; and in this connection defendant alleges that at the time said contract was initiated and approved by plaintiffs, to wit, on November 6th, 1916, plaintiffs requested of defendant a modification of the same so as to give to plaintiffs the discretionary right of substituting another vessel for the schooner "W. H. Marston," which requested modification was refused by defendant. That said requested modification was made in a letter addressed by plaintiffs to defendant, enclosing plaintiff's approval of the instrument referred to in paragraph III of the complaint, and the refusal to so modify said instrument was expressed in a letter addressed by defendant to plaintiffs, both of which letters were in the words and figures as follows:

“San Francisco, November Sixth, 1916.
Douglas Fir Exploitation & Export Co.,
260 California Street,
San Francisco, California.

Dear Sirs: We have to acknowledge receipt of your sale note covering 3500 M' 15% more or less October to December, 1917. We now take pleasure in approving same as per enclosed. It is understood that the vessels named in your sale note are not to load above the bridges on the Columbia River, and with regard to the balance of the purchase, it is understood that same cannot, under any circumstances, be shipped from the Portland Lumber Company. We have also very great prejudice against shipping from the Inman, Poulsen, Clark & Wilson, and Peninsula Mills, and would much appreciate your not stemming us with those mills. We presume also that you would have no objection if it was found convenient, to our substituting other vessels in place of the 'Marston' or the 'Talbot.'

Very truly yours,
COMYN, MACKALL & CO.,
Per J. CLAUDE DALY.

CLD/W.” [26]

“San Francisco, California, November 8th, 1916.
Messrs. Comyn, Mackall & Co.,
310 California St.,
San Francisco, California.

Gentlemen: We acknowledge yours of the 6th and confirm your understanding that none of these vessels will be required to load above the bridges at Portland which, in truth, would exclude the Port-

land Lumber Company, but we will also agree that none of them are to load at the mill at Portland.

The other mills mentioned by you—Inman, Poulsen, Clark & Wilson, and Peninsula Lumber Company—are not interested in our Company, but if they should later come into the Company, Inman, Poulsen would still be excluded on account of being above the bridges. This then would leave only Clark & Wilson and the Peninsula Mills as possibilities, and we would prefer to keep them in that position, as it might be very necessary for us to load one of your vessels at one of these mills.

As regards substituting other vessels for 'Mars-ton' and the 'Talbot': as these vessels are now matters of record in the contract, we would prefer not to have any agreement giving you the option of naming other vessels. If, however, you have now or will have at any future time other vessels in like position and for your convenience wish to substitute them for either one or both of these vessels, we will be pleased to go into the matter with you with a view of meeting your necessities.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EX-
PORT CO.

By A. A. BAXTER,
General Manager.

AAB/D."

Defendant also alleges that upon and after receipt by plaintiffs of the letter from the defendant last above quoted, plaintiffs then and at all times thereafter acquiesced in the refusal of defendant

to so modify said instrument of November 2, 1916; and it was with full knowledge and understanding on the part of plaintiffs that there could be no substitution of another vessel for the schooner "W. H. Marston" without defendant's consent, that plaintiffs thereafter signed their approval and acceptance of the instrument dated December 8th, 1916, set forth in paragraph IV of the complaint and entitled "Acknowledgment of Order," and by which the contract of defendant to furnish and deliver a cargo of fir to the schooner "W. H. Marston," was finally consummated. [27]

III.

That at all times after the final consummation of the contract sued on plaintiffs recognized and understood that it was incumbent upon them, as an obligation under said contract, to have the schooner "W. H. Marston" at the designated mill wharf of the Knappton Mills and Lumber Company, to take delivery at said vessel's tackles of a cargo of fir, until by their own act, and without the consent of defendant, plaintiffs made it impossible for said "W. H. Marston" to make the loading date at said mill wharf agreed to in said contract; and in this connection defendant alleges that plaintiffs were the charterers of the schooner "W. H. Marston," which vessel under her charter was bound, after discharging a lumber cargo in Australia, to proceed direct in ballast to a loading port on the Columbia River, at which latter port she was to load the cargo of fir contracted for in the contract sued on herein, and after being so

loaded with said cargo of fir, was to proceed to the port of Melbourne, Australia; that before said vessel had started on her voyage in ballast from Australia to said Columbia River, her owner desired from plaintiffs, as charterers of the vessel, permission for said vessel to carry, for account of said owner, a cargo of copra on the voyage from Australia to this Coast, instead of said vessel making said voyage in ballast, and for such permission offered to pay to plaintiffs the sum of \$5,000; that knowing it to be impossible for said "W. H. Marston" to load, carry and discharge said new cargo and also make her loading date under the contract in suit, plaintiffs offered defendant the sum of \$2,500.00 if it would agree to extend said "W. H. Marston's" said loading date so as to enable said vessel to carry said new cargo without forfeiting plaintiffs' right to the cargo of fir under the contract with the defendant; that said offer defendant refused and thereafter and despite defendant's refusal to extend said "W. H. Marston's" loading date, plaintiffs accepted [28] said owner's offer of \$5,000.00, received said sum from said owner and thereupon said "W. H. Marston" loaded, carried and delivered said new cargo, instead of returning to this coast direct in ballast, and thereby missed her loading date under the contract with defendant; that it was after said plaintiffs had accepted said offer of said schooner's owner, for the first time contended by plaintiffs that the said "W. H. Marston" was not required at said loading place at said agreed time, but that plaintiffs could

instead of said vessel substitute barges, and on such barges could accept delivery of said fir at said loading time and place.

And defendant alleges that the attempted substitution of a barge for the schooner "W. H. Marston" to take delivery of said schooner's cargo of fir, and plaintiffs' present construction of their contract with defendant, under which construction plaintiffs claim the right to take delivery of said schooner's cargo of fir on barges, is not made in good faith.

IV.

That at the time the contract sued on herein was entered into, it was known and understood by both plaintiffs and defendant, that in and by the use in said contract of a specified number of feet of fir, as the amount that each of the four vessels named, or to be named, should carry, it was intended and only intended, to approximate the number of feet of fir actually sold as the vessel's cargo, the actual amount of such vessel's cargo and the actual number of feet sold, was to be ascertained by the actual loading of the vessel, and being the full carrying capacity of said vessel, limited, however, to a margin of 15%, more or less, of the given approximation; that at said time it was known and understood by both parties that said contract covered a sale of a cargo for the schooner "W. H. Marston," such cargo being estimated to be 1,300,000 feet, but that in loading her if said schooner's capacity [29] was found to be more than said estimate, then the sale was to be for 1,300,000 feet plus such ascertained excess; that if said schooner's capacity in

loading her was found to be less than said estimate, then the sale was to be for such less number of feet, both contingencies being limited to a margin of 15% ;

That the letters "B. M." used in the instrument set forth in paragraph IV of plaintiffs' said complaint means and at all times mentioned in said complaint were intended by plaintiffs and defendant to mean board measure; that the phrase found in said instrument set forth in said paragraph IV reading: "1,300,000 feet B. M. 15% more or less to suit capacity of vessel," means and at all times mentioned in said complaint was intended by plaintiffs and defendant to mean a full cargo as herein above set forth and alleged in this paragraph of defendant's separate answer, and such phrase fixed and was intended by both parties to fix and determine the number of feet sold under said contract, as said vessel's cargo; that only through the actual receipt by and loading of said schooner "W. H. Marston" of said fir, would it be possible to know and determine the number of feet of fir sold under said contract for such vessel's cargo; that in the case of the schooner "W. H. Talbot" (one of the four vessels for which a cargo was agreed to be sold under said contract), while her approximated capacity was fixed in said contract at 1,000,000 feet, her actual cargo was not and could not have been known until said "W. H. Talbot" had actually been loaded, and when actually loaded, the number of feet so loaded was found to be 971,974 feet, and such number of feet fixed and determined the

amount of fir sold to plaintiffs under said contract as the cargo of that vessel; and plaintiffs paid defendant the agreed contract price for said 971,974 feet and for no more; that it would have been impossible to ascertain the amount of fir sold for delivery to the schooner "W. H. Marston" as that vessel's cargo under the said contract, had a barge or barges been furnished as the receiving [30] medium for said fir, instead of said "W. H. Marston," and this fact was known to both plaintiffs and defendant at the times said contract was entered into, and at all times thereafter mentioned in plaintiff's complaint.

V.

That in contracts for the sale of cargoes of lumber to named carrying vessels where a definite number of feet is used in the contract in connection with the phrase "15% more or less to suit capacity of vessel," it is a custom of the trade to load the named vessel to her capacity before determining the amount of lumber actually sold under the contract, and the agreed contract price of the lumber thereafter applies only to the number of feet so determined by actual loading, and even as to such is limited to 15% more or less than the definite number of feet named in the contract; that this custom was at all times mentioned in said complaint well known to both plaintiffs and defendant and was a general custom among buyers and sellers and shippers of lumber cargoes, in the City and County of San Francisco, State of California, and generally in the Pacific Coast ports of the United States.

WHEREFORE defendant prays that said complaint be dismissed and that judgment be entered in favor of defendant for its costs of suit herein and for such other and further relief as may be proper in the premises.

Dated: November 8th, 1918.

McCLANAHAN & DERBY,
Attorneys for Defendant. [31]

State of California,
City and County of San Francisco,—ss.

A. A. Baxter, being first duly sworn, deposes and says: That he is an officer of the defendant corporation, to wit, the general manager thereof, and as such is duly authorized to verify the foregoing answer, that he has read the foregoing answer, and knows the contents thereof, and that the same are true to his own knowledge except as to the matters therein stated on information and belief, and as to such matters he believes them to be true; that he makes this verification for and on behalf of the Douglas Fir Exploitation & Export Company, and defendant herein.

A. A. BAXTER.

Subscribed and sworn to before me this 8th day of November, 1918.

[Seal] JAMES MASON,
Notary Public in and for the City and County of
San Francisco, State of California.

Exhibit "A."

San Francisco,
September nineteenth,
Nineteen - seventeen.

Messrs. Douglas Fir Exploitation & Export Com-
pany,
260 California Street,
City.

Dear Sirs:

"W. H. Marston."

Enclosed we beg to hand you specifications for
this vessel, which we trust you will find in order.
[32]

You will note that the vessel is to be despatched
to Melbourne, and we will require the following
documents:

BILLS OF LADING—Two originals and three
non-negotiable copies covering each mark as
per *pro forma* herewith.

SPECIFICATION—Five (5) copies covering each
mark.

LUMBER BUREAU INSPECTION CERTIFI-
CATE—Four (4) copies.

MARINE UNDERWRITER'S SURVEYOR'S
CERTIFICATE—Four (4) copies.

MASTER'S DEMURRAGE RELEASE — Four
(4) copies.

STOWAGE PLAN—Four (4) copies.

YOUR INVOICE—In duplicate.

Very truly yours,

COMYN, MACKALL & CO.,
Per J. CLAUDE DALY.

CLD/W. [33]

SPECIFICATIONS OF OREGON MERCHANT-
ABLE.

NO MARK

To be shipped to MELBOURNE per S/V

"W. H. Marston."

October/December, 1917.

12x 6	807,500'	(450,000 16/32';	200,000 33/40')	
12x 6½	10,000'	(5,000 16/32';	5,000 33/40')	
12x10	200,000'	(100,000 16/32';	100,000 33/40')	
14x 6	10,000'	(7,500 16/32';	2,500 33/40')	
16x 6	10,000'	(7,500 16/32';	2,500 33/40')	
12x12	10,000'	(5,000 61/70';	5,000 71/80')	
16x16	16,000'	(8,000 51/60';	8,000 61/70')	
18x18	16,000'	(8,000 51/60';	8,000 61/70')	
20x20	5,000'	(5,000 71/80';		
24x24	10,000'	(10,000 16/32';		
16x14	5,000'	(2,500 16/32';	2,500 33/40')	1099,500'
	<hr/>			
	1099,500			

SELECT.

15x 5	25,000'		
18x 4	25,000'		
13x 6½	25,000'		
12x 6	25,000'		100,000'
	<hr/>		
	100,000'		

LATHS.

250,000 pcs. 4'x6"x1½" 3-out. 42,500

PICKETS.

50,000 pcs. 4' 6"x3x1.	58,000	100,500'
	<hr/>	
Total Quantity		1,300,000'
		Super [34]

COMYN, MACKALL & CO.

San Francisco.

Exporters of Lumber,
Shipping and Commission Merchants.

Marks	Pieces	Feet
UNDER DECK		
N/M	— Rhg. Merch. Dg. Fir. Lbr.	
	— Rhg. Select Oregon	
	— Bundles of Laths	
	— Dgl. Fir Pickets	
	On Deck	
	Totals	
	@ 126/3	

5% of cargo 63/7 1/2 [35]

SHIPPED, in good order and condition, by
COMYN, MACKALL & CO., on board the —,
called the “Marston,” whereof — is Master, now
lying at the port of Knappton, Wash., and bound
for Melbourne—Australia, to say:

UNDER DECK.

.... pieces Rough Merchantable Douglas Fir said
to contain (....) feet Board Measure.

.... pieces Rough Select Oregon said to contain
.... (....) feet Board Measure.

.... (....) Bundles of laths each containing ninety
pieces.

.... (....) pieces equalling (....) feet Board
Measure.

.... (....) Bundles Douglas Fir Pickets each con-
taining ten pieces totalling (....)
pieces equalling (....) feet Board
Measure

ON DECK

being marked and numbered as per margin (all on board to be delivered) and are to be delivered in like good order and condition at the aforesaid port of Melbourne—Australia (the Act of God, perils of the sea, fire, barratry of the Master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers and people, collision, stranding and other accidents, of navigation excepted even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners, or other servants of the shipowners) unto order or to its assigns, he or they paying freight for said goods at the rate of as per charter-party dated April 11th, 1916, and amendment thereto, with average as per York-Antwerp Rules, 1890, and other conditions and exceptions as per charter-party.

IN WITNESS WHEREOF, the Master of said Ship or Vessel hath affirmed to two Bills of Lading; all of this tenor and date, one of which Bills being accomplished, the others to stand void.

Dated in ——— this—— day of ———, 191—.

—————, Master. [36]

Receipt of a copy of the within Answer is hereby admitted this 8th day of November, 1918.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiffs.

[Endorsed]: Filed November 8, 1918. Walter B. Maling, Clerk. [37]

(Title of Court and Cause.)

Demurrer to Answer.

Comes now the plaintiffs in the above-entitled action and demur to the defendant's answer herein, and for grounds of demurrer thereto specify:

I.

Plaintiffs demur to defendant's purported separate answer and defense contained in paragraph VII of said answer, beginning at line 27 on page 6 and ending at line 17 on page 7 of said answer, upon the ground that said purported separate answer does not state facts sufficient to constitute an answer to the cause of action stated in plaintiffs' complaint.

II.

Upon the same ground plaintiffs demur to defendant's purported separate answer and defense contained in paragraph VII of said answer, beginning at line 18 on page 7 and ending at line 27 on page 8 of said answer.

III.

Upon the same ground plaintiffs demur to defendant's purported separate answer and defense contained in paragraph VIII of said answer, beginning at line 30 on page 9 and ending at line 10 on page 10 of said answer.

IV.

Upon the same ground plaintiffs demur to the five purported further and separate answers to said complaint contained on pages 11, 12, 13, 14, 15, 16, 17, 18 and 19 of said answer. [38]

WHEREFORE, plaintiffs pray that said answer be dismissed and that plaintiffs have judgment as prayed for in their complaint.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiffs.

Received copy of within demurrer to answer this
27th day of November, 1918.

McCLANAHAN & DERBY,
Attorneys for Defendants.

[Endorsed]: Filed November 29, 1918. W. B.
Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[39]

(Title of Court and Cause.)

Notice of Motion to Strike Out Portions of Answer.

To the Defendant in the Above-entitled Action, and
to Messrs. McClanahan & Derby, Attorneys for
Said Defendant:

PLEASE TAKE NOTICE that the plaintiffs in the above-entitled action will, on Monday, the 9th day of December, 1918, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, move the honorable, the above-named court, at its courtroom in the United States Postoffice Building at *Sixth* and Mission Streets, in the City and County of San Francisco, State of California, for an order striking from the said defendant's answer in said action the following portions thereof, to wit:

I.

In paragraph III of said answer, beginning at line 29 on page 1 and ending at line 2 on page 2

thereof, to wit: "But in this connection defendant alleges that plaintiffs' said written approval of said letter was delivered to defendant enclosed in a letter from plaintiffs, dated November 6th, 1916, and not before."

II.

In paragraph IV of said answer, beginning at line 4 and ending at line 9 on page 2 thereof, to wit: "Answering the allegations of paragraph IV of said complaint, defendant denies that on December 15th, 1916, it notified plaintiffs that it would deliver the 1,300,000 feet of 'fir' [40] specified in said contract as a cargo for the 'W. H. Marston' at the mill wharf of the Knappton Mills and Lumber Company at Knappton, Washington."

III.

In paragraph V of said answer, beginning at line 1 and ending at line 12 on page 3 thereof, to wit: "In this connection defendant alleges that the phrase 'f. a. s.' is a commercial term, known and commonly used in commercial transactions requiring shipments by water, and means free alongside ship, and that such was the understood meaning of said phrase by both plaintiffs and defendant, in its use in the instrument set forth in paragraph III of said complaint. Furthermore defendant alleges, that the use of the phrase 'f. a. s. Mill Wharves,' in the instrument referred to in said paragraph III, was understood by both plaintiffs and defendant to require the actual presence, at a mill wharf, to be designated by defendant, of a sailing vessel to re-

ceive at her tackles, delivery of the cargo of fir agreed to be sold.”

IV.

In paragraph V of said answer, beginning at line 12 and ending at line 22 on page 3 thereof, to wit: “Furthermore defendant alleges, that in contracts for the sale of cargoes of lumber to be delivered ‘f. a. s. mill wharf,’ at a specified time, a custom of the trade requires the actual presence at the designated mill wharf of a vessel to take delivery at her tackles at such specified time, of the cargo of lumber, and that such custom was known to both plaintiffs and defendant at the time the contract sued on herein was entered into, and was a general custom among buyers and sellers and shippers of lumber, in cargo lots, in the City and County of San Francisco, State of California, and generally in the Pacific Coast ports of the United States.” [41]

V.

In paragraph V of said answer, beginning at line 5 and ending at line 12 on page 4 thereof, to wit: “That said ‘G’ List is a standard schedule solely of prices of Douglas Fir lumber, bargained for or sold to be exported only, and that said ‘G’ List furnishes the basis for the quotation of prices for Douglas Fir for export shipment only, to be delivered only to vessels at lumber mills within reach of such vessel’s tackles, and defendant alleges that at all times mentioned, in said complaint, said ‘G’ List was so known and understood by both plaintiffs and defendant.”

VI.

In paragraph V of said answer, beginning at line 13 and ending at line 21 on page 4 thereof, to wit: "Defendant further alleges that among the terms and conditions of said 'G' List which were understood and accepted by both plaintiffs and defendant as forming a part of the contract sued on herein, is one providing that the prices in said 'G' List are based on delivery of the fir by the seller to sailing vessels, and defendant alleges that the prices in the contract sued on were based solely on delivery of a cargo of fir to the sailing vessel 'W. H. Marston,' and that this was at all times the understanding and agreement of both plaintiffs and defendant."

VII.

In paragraph VIII of said answer, beginning at line 10 and ending at line 29 on page 9 thereof, to wit: "And that it in fact did, in accordance with said contract, deliver to the schooner 'W. H. Talbot,' at her tackles, at a designated mill wharf, the full cargo of 'fir' called for in said contract; that in accordance with said contract it delivered to the schooner 'Golden Shore,' at her tackles, at a designated mill wharf (she being one of the vessels which, as required [42] by said contract, plaintiffs subsequently named), the full cargo of 'fir' called for in said contract; that although plaintiffs named, as required by said contract, the schooner 'Wm. Borden' as the fourth vessel, the cargo of 'fir' contracted for for that vessel was not delivered by defendant at her tackles, or at all, because of the failure of plaintiffs to have the said 'Wm. Borden' at the

agreed loading berth at the agreed date, and defendant alleges that the contract in so far as it applied to both the schooners 'W. H. Talbot' and 'Golden Shore' was fulfilled in strict accord with its terms, while that portion of said contract which applied to the schooners 'W. H. Marston' and 'Wm. Borden' was cancelled by defendant for the same reason, namely, the failure of plaintiffs to have either of said last named vessels at the designated loading place within the agreed and specified loading time."

VIII.

All of paragraph I of said answer, beginning at line 18 on page 11 and ending at line 8 on page 14 thereof.

IX.

In paragraph I of said answer, beginning at line 18 on page 11 and ending at line 26 on page 12 thereof, to wit: "That defendant is a corporation organized under the laws of the State of Washington, for the primary object and purpose of exploiting and increasing foreign trade in, and the use and consumption of Douglas Fir and other Pacific Coast forest products, in the foreign countries of the world only; that no person other than one actually engaged in the manufacture of lumber on the Pacific Coast is eligible to subscribe for or become at any time a stockholder in same; that the entire stock of said defendant corporation is now and has [43] been at all times since its organization owned or controlled by corporations and individuals owning or controlling a very large

percentage of all the Douglas Fir lumber manufactured or produced on the Pacific Coast of the United States; that the Knappton Mills and Lumber Company are, and were at all times mentioned in plaintiffs' complaint, stockholders in defendant corporation; that said defendant corporation was organized on October 11th, 1916, and commenced doing an export business in 'fir' on November 1st, 1916, in anticipation of the passage by the Congress of the United States of what was and is now known as the 'Webb-Pomerene Bill,' being the Act of April 10, 1918 (Compiled Statutes, U. S., secs. 8836 $\frac{1}{4}$ a to e inclusive), permitting the organization of corporations or associations for the sole purpose of engaging in export trade, and being an amendment of what is popularly known as the 'Sherman Act' (Act of July 2, 1890, Compiled Statutes, U. S., secs. 8820 to 8836, inclusive); that the anticipated early passage of the said 'Webb-Pomerene Bill' was postponed and said bill did not finally become law until April 10, 1918; that between the date of November 1st, 1916, and the passage of said 'Webb-Pomerene Bill,' defendant did business as an exporter only of Douglas Fir with the tacit consent of the Federal Trade Commission (a commission created by act of Congress of September 26th, 1914, Compiled Statutes, U. S., secs. 8836a to 8836r, inclusive), which commission on the passage of said 'Webb-Pomerene Bill' was given by that law jurisdiction and supervision over the business and affairs of corporations or associations organized to do an export business under that law; that all defendant's

transactions and all the export business done by it after its organization, and up to the passage of said 'Webb-Pomerene Bill,' were regularly and duly reported to said Federal Trade [44] Commission, and said commission was kept fully informed at all times of defendant's corporate acts, and especially its sales of Douglas Fir for exportation to foreign countries."

X.

All of paragraph II of said answer, beginning at line 10 on page 14 and ending at line 5 on page 16 thereof.

XI.

All of paragraph III of said answer, beginning at line 7 on page 16 and ending at line 22 on page 17 thereof.

XII.

All of paragraph IV of said answer, beginning at line 24 on page 17 and ending at line 13 on page 19 thereof.

XIII.

All of paragraph V of said answer, beginning at line 15 and ending at line 29 on page 19 thereof.

Said motion will be made upon the ground that each and every of the said portions of said answer sought to be stricken out is and are irrelevant, incompetent and immaterial, and that the purported facts therein stated constitute no defense to the cause of action stated in plaintiffs' complaint in said action.

Dated: November 27th, 1918.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiffs.

Received copy of within notice of motion to strike out portions of answer this 27th day of November, 1918.

McCLANAHAN & DERBY,
Attorneys for Defendants.

[Endorsed]: Filed November 29th, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[45]

At a stated term, to wit, the July term, A. D. 1919, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 14th day of July, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge:

No. 16,127.

W. LESLIE COMYN et al.

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
CO.

**Order Denying Motion to Strike Out Parts of
Answer, etc.**

Plaintiff's motion to strike out parts of answer and demurrer to answer, heretofore heard and submitted, being fully considered and the Court having rendered its oral opinion, it is ordered that said

motion be and the same is hereby denied, and that said demurrer be and the same is hereby sustained as to the portion of the answer beginning at paragraph 1 on page 11, and that said demurrer be overruled as to remaining portion of the answer. [46]

At a stated term, to wit, the November term, A. D. 1920, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Friday, the 31st day of December, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 16,127.

W. LESLIE COMYN et al.

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
CO.

**(Order Directing Opinion to be Filed and That
Judgment be Entered.)**

Ordered that the opinion of the Honorable Robert S. Bean, District Judge, and the findings of fact and conclusions of law signed by Judge Bean, herein, be filed and that judgment be entered in favor of plaintiff in accordance therewith. [47]

In the Southern Division of the District Court of
the United States for the Northern District of
California, Second Division.

No. 16,127.

W. LESLIE COMYN and BENJAMIN F. MAC-
KALL, Copartners Doing Business Under
the Firm Name of COMYN, MACKALL &
COMPANY,

Plaintiffs,

VS.

DOUGLAS FIR EXPLOITATION & EXPORT
COMPANY, a Corporation,

Defendant.

Findings of Fact and Conclusions of Law.

This case was tried without the intervention of a jury and the Court having heard the evidence and argument of counsel, makes the following findings of fact in addition to the admissions in the pleadings, and conclusion of law:

1.

That prior to October 17, 1916, the plaintiff had contracted to purchase from Charles Nelson & Co., manufacturers of lumber, and the Nelson Company to sell to it 3,500,000 feet, ten per cent more or less Oregon (fir), shipment or loading July to December, 1917. No receiving vessel was named in the contract, but a memorandum thereof was enclosed in a letter of date October 17, from the plaintiff to Nelson Company, saying that "it is probable that

we will load under this contract the 'W. H. Marston,' October, November, December, and the 'W. H. Talbot' for same loading; on the balance of the contract we may put in two of our own vessels estimated 1,450,000 capacity, October, November, December." Thereafter and on November 1, 1916, defendant corporation, composed of various manufacturers of fir lumber in Oregon and Washington, including the Charles Nelson Company, commenced doing business and took over the sales of lumber of the member concerns for export, and its letter [48] to plaintiff of date November 2, 1916, as set out in Article III of the complaint, was confirmatory of and by reason of the previous contract between the Nelson Company and plaintiff.

2.

In the lumber trade the letters f. a. s., f. o. b. and a. s. t., as used in the contracts between the plaintiff and defendant as set out in the pleadings mean, respectively, "free alongside; within reach of ship's tackles," "free on board" and "at ship's tackles," and were so understood by both parties at the time of the making of such contracts.

3.

That plaintiff's written approval of defendant's letter of November 2, 1916, as set forth in Article III of the complaint was not sent or delivered to defendant on that date, but enclosed in letter from plaintiff to defendant of date November 6, 1916, in which plaintiff stated, "we presume also that you would have no objection if it was found convenient to us, to substituting other vessels in place of the

‘Marston’ and the ‘Talbot,’ ” to which letter defendant replied under date of November 8, 1916, as follows: “As regards substituting other vessels for the ‘Marston’ and ‘Talbot,’ as these vessels are now matters of record in the contract we would prefer not to have any agreement giving you the option of naming other vessels. If, however, you have now or will have at any future time other vessels in like position and for your convenience wish to substitute them for either one or both of these vessels, we will be pleased to go into the matter with you with a view of meeting your necessities.” And such was the situation at the time the contract set out in Article IV of the complaint (or acknowledgment of order) was executed and delivered. [49]

4.

That the vessel “Marston” referred to in the agreements set out in the pleadings was never at the mill wharf of the Knappton Mills & Lumber Company at any time within the period from October 1st to December 31st, 1917, inclusive, and was never tendered to defendant to carry the lumber referred to, and her presence at the loading place was not waived by defendant.

5.

That on September 19, 1917, plaintiff furnished to defendant specifications for the lumber to be cut by it for the “Marston,” and defendant in acknowledging receipt thereof, stated that as the vessel’s position at that time was such that “she would have very little chance of discharging her cargo and returning to the Columbia River in time to commence

loading during December," it would hold the specifications for the present at least.

6.

On September 27, 1917, plaintiff notified defendant that it would take delivery of the lumber f. a. s. mill wharf Knappton and/or barges a. s. t. mill wharf Knappton in the month of December, but under date of October 1st defendant declined to consent to the change requested since "order was sold for shipment by the 'W. H. Marston.' "

7.

That on October 10, 1917, plaintiff again notified defendant that it would take delivery of the 1,300,000 feet B. M. of lumber ("15% more or less at your option if desired") beginning December 3, 1917, at the rate of 60,000 feet per working day. That "if this date is inconvenient for you we will commence to take delivery later in December. We [50] *giving* you the option of making delivery in any manner prescribed in the contract to wit, f. a. s. mill wharf Knappton, and/or on barges a. s. t. mill wharf at Knappton and request to be advised of the date when you will commence delivery and which option you elect." The defendant refused to make delivery as requested or at all.

8.

That on October 23, 1917, plaintiff notified defendant that it would have barges alongside the mill wharf on November 25th, ready to take delivery, and on the date named in such notice plaintiff did have a barge at the dock ready to take delivery. Defendant refused to make such delivery and on

January 2, 1918, notified plaintiff that as the "Marston" had not arrived and the time had expired by limitation it had canceled the contract.

9.

That during the month of December, 1917, the prevailing market price of lumber at the place of delivery was \$22.50 per thousand net base G list, being a difference on the quantity of lumber specified in the contract between the market price and the contract price of \$17,511.00.

10.

That plaintiff expended the sum of \$304.00 in preparing to take delivery as hereinbefore set forth.

11.

That there was no material or competent evidence offered or given on the trial showing any custom which is sufficient to vary in any way the written agreement or contract between the parties as alleged in the pleadings. [51]

As conclusions of law the Court finds:

First: That the failure of the plaintiff to have the "Marston" alongside the mill wharf ready to take delivery of the lumber within the delivery dates did not relieve the defendant from making delivery as demanded by plaintiff.

Second: That plaintiff is entitled to judgment against defendant for the sum of \$17,815.00, with interest from December 7th, and its costs and disbursements.

To each of the foregoing findings of fact and conclusions of law the defendant excepts, which exceptions are hereby allowed.

Dated this 28th day of December, 1920.

R. S. BEAN,
Judge.

[Endorsed]: Filed December 31, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[52]

(Title of Court and Cause.)

Judgment on Findings.

This cause having come on regularly for trial upon the 28th day of October, 1920, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed; Oscar Sutro and M. H. Farmer, Esqrs., appearing as attorneys for plaintiffs, and E. B. McClanahan and S. H. Derby, Esqrs., appearing as attorneys for defendant; and the trial having been proceeded with on the 29th and 30th days of October, 1920, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys, having been submitted to the Court for consideration; and the Court, after due deliberation, having filed its findings in writing and ordered that judgment be entered herein in accordance with said findings; and the plaintiffs having filed in writing their remission of the sum of \$304.00 from the amount allowed the plaintiffs in said findings:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that W. Leslie Comyn and Benjamin F.

Mackall, copartners doing business under the firm name of Comyn, Mackall & Co., plaintiffs, do have and recover of and from Douglas Fir Exploitation & Export Company, a corporation, defendant, the sum of seventeen thousand five hundred ninety-two and 72/100 (\$17,592.72) dollars, together with their costs herein expended taxed at \$135.50.

Judgment entered December 31, 1920.

WALTER B. MALING,
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk.

[Endorsed]: Filed Dec. 31, 1920. Walter B. Maling, Clerk. [53]

(Title of Court and Cause.)

Memorandum Opinion.

Memorandum by BEAN, District Judge:

As appears from the findings of fact herewith filed, the single question for decision is whether the failure of plaintiff to have the "Marston" at the mill wharf ready to receive cargo within the delivery dates specified in the contract relieved the defendant from the obligation to make delivery as demanded. In other words, whether the plaintiff could legally require delivery without furnishing the named vessel as the receiving medium. This question in substance was decided by Judge Van Fleet adversely to defendant on demurrer to the complaint. In his opinion I fully concur. The naming of the

vessel in the contract, in my judgment, was a stipulation for the benefit of plaintiff and could be waived by it. (Ellsworth vs. Knowles, 97 Pac. 690; Meyer vs. Sullivan, 181 Pac. 847; Harrison vs. Fortlage, 161 U. S. 64.) It does not affect the identity of the subject matter nor the time and place of delivery. The failure of plaintiff to furnish the named vessel did not add anything to the obligations of defendant. It was in no way important to it whether the buyer transferred the lumber to the "Marston" or to some other carrier, so long as it did not impose upon it any additional expense or undue delay. It would have fully discharged all the obligation on its part if it had cut and delivered the lumber on the wharf or on barge as demanded by plaintiff. The fact that the parties contemplated that the lumber would be loaded on the "Marston" did not make the "Marston" a necessary feature of the performance of the contract by defendant, or a condition precedent to defendant's obligation to make delivery. The provision f. o. b. mill wharf "within [54] reach of ship's tackles" or "on barges a. s. t. mill wharf" did not affect the seller's obligation to deliver on the mill wharf or on barges. The delivery would be complete and its obligations discharged as soon as the lumber was placed on the mill wharf or on barges at mill wharf and accepted by plaintiff. It was wholly immaterial whether plaintiff used the "Marston" or some other receiving medium for shipment of the lumber.

It is claimed that the contract was for a cargo

sale and that the capacity of the "Marston" was the measure of the quantity to be delivered, but the contract names the quantity, and the expression therein, "15% more or less to suit capacity of vessel," would simply allow the specified quantity to be varied to that extent, if the named vessel had been tendered as the receiving medium, but the failure to tender it would not relieve the defendant from making delivery if demanded of the specified quantity.

It is also said that the time and place of delivery was affected by the naming of the "Marston," but these matters are both fixed by the contract, and plaintiff offered to take delivery as therein specified.

Defendant's motions for nonsuit and directed verdict are therefore denied and overruled, and judgment will be entered for plaintiff as prayed for.

[Endorsed]: Filed Dec. 31, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [55]

(Title of Court and Cause.)

Petition for New Trial.

Now comes the defendant above named at the same term of Court at which the said action was tried, and within ten days after the entry of judgment herein moves to set aside the judgment heretofore entered herein and that a new trial of said cause be granted for the following causes, to wit:

1. Insufficiency of the evidence to justify the said decision;
2. That the said decision is against law;
3. Errors in law occurring at the trial;

Defendant now specifies the particular errors at law occurring at the trial:

1. The Court erred in refusing the offer of defendant to prove that the defendant commenced doing business on November 1, 1916, in anticipation of the passage by Congress of the Webb-Pomerene Bill, and that between November 1, 1916, and the passage of the said Webb-Pomerene Bill the defendant did business as an exporter, with the tacit consent of the Federal Trade Commission; to which ruling an exception was taken and allowed.

2. The Court erred in denying defendant's offer to prove the facts contained in each of the five separate defenses in the answer to the complaint, and embraced within paragraph I to paragraph V on page 11 to page 20 of said answer; to each of which rulings an exception was taken and allowed.

3. The Court erred in sustaining the objections of plaintiffs to the following questions asked by defendant of the witness W. Leslie Comyn, "When did you secure a buyer [56] for this cargo?" and "Was the contract with your buyers in Australia not made before October, 1917?" and "Was this lumber that was loaded onto the 'Marston' by Dant & Russell not used in the fulfillment of the contract which had been made prior to October, 1917?" and "Did you not suffer no loss in the fulfillment of that contract by the lumber loaded on

to the 'Marston' by Dant & Russell?" To each and every of which said rulings an exception was taken and allowed.

4. The Court erred in denying to the defendant the right to offer evidence in support of the following offer, viz., "to prove that plaintiffs' contract with their Australian buyers of the specification cargo to be furnished under the specification cargo contract in suit was carried out at a profit to the plaintiffs, and that such profit was the profit which the contract originally carried, although such contract with the Australian buyers was fulfilled by the 'W. H. Marston' with the cargo loaded under the Dant & Russell contract"; to which ruling an exception was made and allowed.

5. The Court erred in denying the motion of defendant for a nonsuit, which was made at the conclusion of plaintiffs' case in chief, and which said motion was renewed at the conclusion of the taking of all the testimony in the case; to which rulings specific objections were made and exceptions allowed.

6. The Court erred in denying the motion of defendant made after all the evidence in the case had been produced, to the effect that the Court find in favor of the defendant; to which ruling an exception was taken and allowed.

7. The Court erred in overruling the demurrer of defendant to the complaint.

8. The Court erred in sustaining the demurrer of plaintiffs [57] to each and every of the five

special defenses set out in the answer beginning at paragraph 1 on page 11 thereof.

9. The Court erred in finding as a conclusion of law that the failure of the plaintiffs to have the "Marston" alongside the mill wharf ready to take delivery of the lumber within the delivery dates specified did not relieve the defendant from making delivery as demanded by plaintiffs.

10. The Court erred in making each and every finding of fact or conclusion of law that plaintiffs are entitled to judgment against the defendant in any sum.

Defendant now specifies the particulars wherein the evidence is claimed to be insufficient to justify the decision, to wit:

1. There is no evidence that the failure of the plaintiffs to have the "Marston" alongside the mill wharf ready to take delivery of the lumber within the delivery dates did not relieve the defendant from making delivery as demanded by plaintiffs.

2. There is no evidence that plaintiffs are entitled to a judgment against the defendant for the sum of \$17,815, or in any sum.

3. There is no evidence to support the finding contained in paragraph numbered 9 of the findings of fact, to the effect that the plaintiffs are entitled to the sum of \$17,511 for the alleged breach of the contract in suit; it being apparent that under the contract at least fifteen per cent of that amount should be deducted.

4. There is no evidence to justify the Court in including in the amount awarded against defend-

ant the sum of \$304 expended by plaintiffs in preparing to take delivery, for the reason that the right to recover the said sum of \$304 was waived by the [58] plaintiffs.

This petition will be heard upon the pleadings and papers on file herein and upon the minutes of the Court and upon this petition.

Dated January 10, 1921.

McCLANAHAN & DERBY,
CHICKERING & GREGORY,
Attorneys for Defendant.

Service of the within petition for a new trial and receipt of a copy is hereby admitted this 10th day of January, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 10, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [59]

At a stated term, to wit, the March term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Saturday, the 16th day of April, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,127.

W. LESLIE COMYN et al.

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
CO.

(Order Denying Defendant's Motion for New Trial.)

In accordance with the written directions of Judge Bean, it is ordered that the defendant's motion for a new trial be and the same is hereby denied. [60]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,127.

W. LESLIE COMYN and BENJAMIN F. MACKALL, Copartners Doing Business Under the Firm Name of COMYN, MACKALL & CO.,

Plaintiffs,

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
COMPANY, a Corporation,

Defendant.

**Engrossed Bill of Exceptions for Use on Appeal from
Judgment.**

BE IT REMEMBERED that the above-entitled action came on regularly for trial on the 28th day

of October, 1920, before the Honorable Robert S. Bean, Judge of the above-entitled court, sitting without a jury, Oscar Sutro, Esq., Milton H. Farmer, Esq., and Messrs. Pillsbury, Madison & Sutro, appearing as attorneys for the above-named plaintiffs, and Messrs. McClanahan & Derby, appearing as attorneys for the above-named defendant.

After opening statements had been made by Mr. Sutro for the above-named plaintiffs, and by Mr. McClanahan for the above-named defendant, the following proceedings were had:

Testimony of W. Leslie Comyn, for Plaintiffs.

W. LESLIE COMYN was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination.

My name is William Leslie Comyn, and I am engaged in the [61—1] business of ship owner, manufacturer, lumber exporter and other businesses. Among other matters I am interested in lumber-mills on Puget Sound, but not on the Columbia River. What I have just said about my business was true in 1916.

Mr. SUTRO.—Q. Now, Mr. Comyn, I show you an instrument which is pleaded in the complaint, and ask you if you recognize that. A. I do.

Q. That is the sales memorandum, if we may so term it, dated November 2, 1916, signed “Douglas Fir Exploitation & Export Co., by A. A. Baxter, General Manager,” and addressed to Messrs.

(Testimony of W. Leslie Comyn.)

Comyn, Mackall & Co. I think I would like to read it to your Honor. As there are not many of these papers that I want to read, I think perhaps I had better read this. It is on the letter-head of the Douglas Fir Exploitation & Export Company, 260 California Street.

Plaintiffs' Exhibit No. 1.

“San Francisco, Cal., November 2, 1916.

Messrs. Comyn, Mackall & Co.,

310 California St.,

City.

Gentlemen:

Sold prior to October 11, 1916.

This will confirm sale to you of four cargoes Fir F. A. S. mill wharves as follows:

‘W. H. Marston’ 1300 M October to December 1917.

‘W. H. Talbot’ 1000 M “ “ “ 1917.

(Quotations subject to change without notice.

All agreements are contingent upon the acts of God, riots, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes of delay beyond our control)

and two of your own vessels to be named later, with a combined capacity of 1450 M, both for loading October to December 1917, cargo to be furnished F. A. S. vessel at loading ports at 60 M daily in Puget Sound, Columbia or Willamette Rivers, Gray’s Harbor and Willapa at our option, but one loading port only for each vessel, loading port to be named by us in ample time to give vessel instruc-

(Testimony of W. Leslie Comyn.)

tions before leaving her next previous port of call.

Tally and inspection by Pacific Lumber Inspection Bureau at loading port. Certificate to be furnished and to be final. Price \$9.50 base 'G' list less 2½%, 2½% cash. Marking if required, distinguishing mark at 10¢ per M extra cost.

Written in duplicate. Please approve and return one [62—2] copy.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By A. A. BAXTER,
General Manager."

Now, we will offer that as Plaintiff's Exhibit 1.
(The letter was marked Plaintiff's Exhibit 1.)

WITNESS.—(Continuing.) I believe that that sales note was received by my company and approved and returned by us to the defendant.

Mr. SUTRO.—What is the meaning, as you understand it, of the language, "Sold prior to October 11, 1916"?

Mr. McCLANAHAN.—I object to that, if your Honor please, as immaterial, irrelevant and incompetent, this being a case upon this particular contract, and not upon any other.

The COURT.—I think the objection is not well taken. There is a statement in this contract, and it needs explanation. The Court cannot interpret it without knowing what it means, if it has any bearing on the issues at all.

(Testimony of W. Leslie Comyn.)

To which ruling the said defendant duly excepted, and now assigns the same as error.

EXCEPTION No. 1.

WITNESS.—(Continuing.) To begin with, this is an improper statement of fact. The cargo was purchased from the Charles Nelson Company on the 17th of October, and you have the contract, I believe, yourself, in your possession. This cargo, or these four cargoes had actually been purchased from the Charles Nelson Company on October 17, 1916.

Mr. McCLANAHAN.—Now, if your Honor please, I renew my motion and ask that the answer be stricken out.

The COURT.—The objection will be overruled, and you may take an exception. This trial is before the Court, and, therefore, I [63—3] feel that I am entitled to all the facts surrounding the case, if I have to interpret this contract.

To which ruling the said defendant duly excepted, and now assigns the same as error.

EXCEPTION No. 2.

WITNESS.—(Continuing.) These four cargoes of lumber were sold October 17, 1916. The fact is, however, that the sale was made by contract with the Charles Nelson Company October 17, 1916. The memorandum dated October 17, 1916, which you show me, is the contract with the Charles Nelson Company, to which I have just referred. That is a copy of the letter which accompanied that contract. The document denominated Exhibit No. 1,

(Testimony of W. Leslie Comyn.)

dated November 2, 1916, was prepared by the defendant and sent to us.

Thereupon Mr. Sutro read and offered in evidence a copy of said memorandum, which was in words and figures as follows:

Plaintiffs' Exhibit No. 2.

“October Seventeenth, 1916.

Messrs. The Chas. Nelson Co.,
San Francisco, California.

Dear Sirs:

Confirming the writer's conversation with your Mr. Baxter to-day”—

—is that the same Mr. Baxter, Mr. Comyn, who signed this? A. Yes.

Q. The gentleman who is sitting there? A. Yes.

Mr. SUTRO.—(Continues reading:)

“Confirming the writers conversation with your Mr. Baxter today, we have purchased:

3500 M 10% more or less Oregon.

Shipment and/or Loading—July to December,
1917.

Price: \$10.00 per thousand base ‘G’ List less
2½ and 2½ f. a. s. mill.

Port of Loading—It is your option to load the above on Puget Sound, Columbia or Willamette Rivers or on Grays or Willapa Harbor, always provided of course that we have the right of loading at these places in Charter Party.

This contract is in duplicate, one of which we have signed, and shall be pleased if you will com-

(Testimony of W. Leslie Comyn.)

plete and return the [64—4] other at your convenience.

Very truly yours,
COMYN, MACKALL & CO.,
Per _____.”

WITNESS.—(Continuing.) That was signed by Mr. C. L. Daly.

Thereupon Mr. Sutro read and offered in evidence a letter in words and figures as follows:

“October Seventeenth, 1916.

Messrs. The Chas. Nelson Co.,

San Francisco, California.

Dear Sirs:

Referring to the contract enclosed covering purchase of 3500 M of Oregon it is probable that we will load under this contract the ‘W. H. Marston’ October/November/December and the ‘W. H. Talbot’ for the same loading. On both of these vessels we have the option of loading on Puget Sound or Columbia or Willamette Rivers. On the balance of the contract we may put in two (2) of our own vessels, estimated about 1450 M capacity, October/November/December, which can load at any of the several ports mentioned in the contract.

Very truly yours,
COMYN, MACKALL & CO.,
Per _____.”

WITNESS.—(Continuing.) C. L. Daly signed that letter too.

Mr. SUTRO.—We offer these two as Exhibit 2.

(Testimony of W. Leslie Comyn.)

Mr. McCLANAHAN.—I object to the offer on the ground that they are immaterial, irrelevant and incompetent. The contract sued on here is with a different company, and for a different kind of lumber; this calls for Oregon, ours called for Douglas Fir, and I cannot see, for the life of me, the relationship. I have never seen this contract before, it is not covered by the pleadings, and is not in issue, this contract. Will counsel state his purpose in offering it?

Mr. SUTRO.—The purpose is to explain the phrase “Sold prior to October 11, 1916,” put into Mr. Baxter’s memorandum to [65—5] Mr. Comyn, and which we expect to explain still further when Mr. Baxter gets on the stand.

The COURT.—This memorandum or note, or this communication of November 2d, says, “This will confirm sale to you of four cargoes.”

Mr. SUTRO.—Yes, and we expect to show there were some negotiations prior to that time; I suggest that it be admitted subject to the objection, and Mr. McClanahan will be entitled to an exception to the ruling.

Mr. McCLANAHAN.—Yes.

Mr. SUTRO.—The price in your contract with The Chas. Nelson Co. was set at \$10 per thousand, and the price in the sale note of November 2, 1916, was \$9.50 a thousand. I understand from you that the contract expressed on November 2, 1916, was the sale intended to be covered by the corre-

(Testimony of W. Leslie Comyn.)

spondence that I have just read, Exhibit 2? Will you explain, please, the different price?

A. When the Douglas Fir Exploitation & Export Co., which is a monopoly, was formed, it endeavored to take over all of the lumber they could that was sold before a certain date, and they took this in under their arrangement, although it was sold after that date, and their price for that lumber was \$9.50, and they took these cargoes over, and they had to put them in at \$9.50, if they were going to put them into the Douglas Fir Exploitation & Export Company at all.

Q. What date did the Douglas Fir Exploitation & Export Company commence to actively function, operate, do you remember?

WITNESS.—(Continuing.) I don't remember the exact date upon which the Douglas Fir Exploitation & Export Company commenced actively to operate, it was about October 11, 1916. At that time they took over from various exporters the contracts which they had with various mills. This is one of the contracts that the [66—6] Douglas Fir Exploitation & Export Company took over from Charles H. Nelson. The mills of the Charles H. Nelson Company went into the Douglas Fir Exploitation & Export combination, so that on November 2, 1916, the Charles H. Nelson Company had made this contract with me and had gone into the combination. The only action which we took then with reference to the contract which we had with the Charles Nelson [67—6a] Company so far as

(Testimony of W. Leslie Comyn.)

transferring it to the Douglas Fir Exploitation & Export Co. is what is in the record, that is, we permitted the Douglas Fir Exploitation & Export Co. to take the contract over. At that time the price which the Douglas Fir fixed for lumber of this kind was \$9.50 a thousand, then they promptly put it to \$10.00. Our contract with the Nelson Company, according to our correspondence, was \$10.00 a thousand. If we had got the cargo we would have got it for \$9.50, but we never did get it. In other words, in the contract that we made with the Douglas Fir the price was changed to \$9.50. The cargo of lumber, or the four cargoes of lumber that we were buying under their sales note of November 2, 1916, were intended to be the four cargoes that we had contracted for with the Charles Nelson Company, but not necessarily at the same loading ports. We had the same choice as to loading ports. At the time we made this contract with the Charles Nelson Company we had not specified any of the four ships. We said we would probably load certain vessels.

Mr. McCLANAHAN.—I understand this is all subject to my objection.

The COURT.—All subject to your objection.

“F. a. s.” means free alongside. It means free alongside the mill wharf or free alongside anything you choose to put in. If you put a barge there it would be free alongside of the barge. If you put a sailing vessel there, it would be free alongside the vessel, of a steamer, free alongside the steamer. In the phrase “f. a. s.” the letter “s”

(Testimony of W. Leslie Comyn.)

stands for "side." It certainly does not stand for "ship." It is a very well-known term in the trade.

The COURT.—Q. And you say it means "free alongside" mill wharf?

A. Free alongside; it means free alongside at the face of the [68—7] wharf. The lumber is not delivered to you in the mill.

WITNESS.—(Continuing.) When the note contains "'W. H. Marston' 1,350,000 feet October to December, 1917, 'W. H. Talbot' 1,000,000 feet October to December, 1917," it means that the lumber was to be delivered and taken by us between the months named, and when it contains "and two of your own vessels to be named later" it means that we would probably put in two vessels that we owned at a later date. On November 2, 1916, at the time when this contract was made, I did not myself know what two ships would take the balance of this lumber, neither did the Douglas Fir know. I couldn't say offhand what ships we actually later selected to carry these cargoes. I could refresh my memory and tell you. Upon your refreshing my memory I recall that the "Golden Shore" was one of them, and the "Borden" was another. None of these ships had been named at the time that this contract was made, and we did not have them in contemplation. So far as I know, the Douglas Fir did not know anything about them. This contract was signed without two of our ships being known, even to ourselves, because we did not own either of those ships as a matter of fact. We had in contemplation putting in two of

(Testimony of W. Leslie Comyn.)

our own with a combined capacity of 1,450,000 feet. The 1,300,000 feet which we intended to carry by the "Marston" and the 1,000,000 feet which we intended to carry by the "Talbot" and the 1,450,000 feet which we intended to carry by the other two, would approximately make the quantity that we had contracted for.

When the contract says "Cargo to be f. a. s. vessel" the "f. a. s. vessel" means free alongside vessel. It does not mean "free alongside ship vessel." The letter "s" there does not mean "ship." Suppose it was a steamer, you would not say "f. a. s." meant alongside the steamer. When it says "Tally and inspection by Pacific Lumber Inspection Bureau at loading port" it means [69—8] these cargoes are all tallied by the Pacific Lumber Inspection Bureau, which is an independent concern. It is free of the mills and free of the buyers; it is an independent inspection bureau or board of surveyors. They tally and inspect any lumber that we jointly tell them to tally and inspect. The Pacific Lumber Inspection Bureau certificate is accepted by the mill, on the one hand, and the buyer, on the other, as being the correct statement of the condition and quantity of the lumber. That inspection is sometimes made for lumber that is loaded on to barges. I have known that to be done very often. There is no difficulty at all about inspecting lumber loaded on vessels. With regard to export lumber, the inspection is always made of lumber that is loaded on to a mill wharf. The inspection is never made after the lum-

(Testimony of W. Leslie Comyn.)

ber is put on to the vessel; it is always made before it goes, before it leaves the mill.

Under the custom of the trade, and under this contract, as I understand it, the seller's obligations ceased in respect to the delivery of the lumber when we took it from the mill wharf. The buyer puts it on the ship, and the seller's obligation is complete when he puts the lumber on the mill wharf. He must not leave it outside of the mill wharf, he has got to bring it to the face of the wharf so that you can get it and put it anywhere you want to. The buyer is responsible for the taking of the cargo off of the mill wharf. If a steamer is alongside the mill wharf, what I have just stated is absolutely true because you pay the steamer a certain rate which provides that she shall put her tackle over and put that stuff over on board. If you put a steamer alongside, the buyer takes the lumber off the wharf and puts it on the steamer. The seller has nothing to do with that operation. If you put a sailing vessel alongside the wharf, the fact is absolutely the same. With regard to putting the lumber on a sailing [70—9] vessel, when you charter a ship you pay that ship a certain rate for chartering. The buyer puts the lumber on the sailing vessel. All that the seller has to do with it is to deliver it on the face of the mill wharf so that the ship can get at it. He does not have to put it on the sailing vessel. If you put barges alongside the wharf, the buyer puts the lumber on the barges. The seller has nothing to do with that. The seller's obligations in respect

(Testimony of W. Leslie Comyn.)

to the delivery of the lumber are the same whether it be a steamer, a sailing vessel, or a barge, where he buys the stuff "f. a. s. mill wharf." By "Price \$9.50 base 'G' list less $2\frac{1}{2}\%$, $2\frac{1}{2}\%$ cash," it is meant that the price of the lumber is based on a certain rate, a certain specified base for various sizes; the "G" list provides certain different prices for different sizes. It is a base price. I think it is the Pacific Coast Lumber Association or the Pacific Coast Lumber Inspection Bureau who put it out, I don't know which. It might be the West Coast Lumbermen's Association, I would not swear to it. The mill people are responsible for getting it out. Very likely it was the Douglas Fir that got it up. They do it now. They do a lot of things since they have got in. The "G" list furnishes the base price. The base price is varied according to the market. The market goes up and down and they vary the price. The last $2\frac{1}{2}\%$ is $2\frac{1}{2}\%$ commission, $2\frac{1}{2}\%$ discount for cash.

"Marking if required, distinguishing mark at 10¢ per M extra cost," means that if you require your lumber marked, they charge you that much more. It is a stipulation for our benefit, for the benefit of the buyer. This sales memorandum was followed by a letter dated December 15, 1916. We received that letter. It enclosed four orders such as that.

Mr. SUTRO.—It can be stipulated, I suppose, that the other one of the vessels to be named was the same as this? [71—10]

(Testimony of W. Leslie Comyn.)

Mr. McCLANAHAN.—In its general statement, yes.

Mr. SUTRO.—Essentially the same.

Q. Now, Mr. Comyn, as you have identified this letter, I show you three orders which have been produced by Mr. McClanahan, headed “W. H. Marston,” “W. H. Talbot,” and “Vessel to be named,” and ask you if those three orders were three of the orders accompanying this letter of December 15? A. They were.

Q. And then was there a fourth order, “Vessel to be named”? A. There was.

Q. Now, in respect to the “Marston,” the order which I am about to offer is set out on page 3 of the complaint. This is a letter which is not set out in the complaint, a letter headed,—

Plaintiffs' Exhibit No. 3.

“DOUGLAS FIR EXPLOITATION AND EXPORT CO.

December 15, 1916.

Comyn, Mackall & Co.

City.

Gentlemen:

We enclose herewith the following orders:

Order #39—Schr. ‘W. H. Talbot’: We have placed this with the Raymond Lumber Co. of Raymond, Wash.

Order #40; Vessel to be named—725M: We have placed this cargo with the Hanify Co. at Raymond, Wash.

Order #41; Vessel to be named—725M: We have placed this with the Kleeb Lumber Co., South Bend, Wash.

Order #38: Schr. 'W. H. Marston': We have placed this cargo with the Knappton Mills and Lumber Co. at Knappton, Wash.

Would ask you to sign the acceptance copy of these orders and return same for our files.

Thanking you for the business, we remain,

Yours very truly,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By D. C. THOMPSON." [72—11]

Said letter was thereupon admitted in evidence and marked Plaintiffs' Exhibit No. 3.

Mr. SUTRO.—Now, we would like to offer in evidence the order with the acceptance of Comyn, Mackall & Co., and ask that that be marked plaintiffs' Exhibit No. 4.

The COURT.—Is that the order for the "Marston"? Is that the one copied into the complaint?

Mr. SUTRO.—Yes.

Said letter was thereupon admitted in evidence and marked Plaintiffs' Exhibit No. 4, which was in words and figures as follows:

Plaintiffs' Exhibit No. 4.

ACKNOWLEDGMENT OF ORDER.

Douglas Fir Exploitation
& Export Co.
260 California St.,
San Francisco, Cal.

Our No. 38, page 1.
Date December 8, 1916.
Your Order No.——.
Dated ——.

Knappton Mills & Lumber Company.
Sold to—Comyn, Mackall & Company.
For Account of—
To be delivered at Knappton, Wash.
For reshipment to—
Time of Shipment October to December, 1917.
Time of Delivery do

Mill tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per confirmation irrespective of original order unless advised to the contrary by you.

Pieces.	Feet.	Size.	Length.	Description.
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SCH. "W. H. MARSTON."

1,300,000 feet B. M. 15% more or less to suit capacity of vessel.

PRICE: \$9.50 Base "G" List, less 2½% & 2½% for cash.

DESTINATION: Australia. (Usual Australian Specifications.)

GRADE: As per "G" list, P. L. I. B. Certificate to be furnished.

DELIVERY: 60 M feet per working day or pay demurrage as provided by Charter Party.

MARKING: Marking if ordered, 10 cents per M, Net Cash. [73—12a]

SHIPMENT: October to December, 1917.

TERMS AND CONDITIONS: As per "G" list.

NOTES: This price is for delivery F. O. B. Mill Wharf, Knappton, within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf, Knappton, Wash.

Accepted: COMYN, MACKALL & CO.

Per J. CLAUDE DALY.

Dec. 28, 1916.

Please return for our files.

DOUGLAS FIR EXPLOITATION & EXPORT CO.

Note

Refer to E. G.

O. K.—E. R. G.

Thereupon the order for the "W. H. Talbot," with the acceptance of Comyn, Mackall & Co., was

admitted in evidence and marked Plaintiffs' Exhibit No. 5, which was in words and figures as follows:

Plaintiffs' Exhibit No. 5

Douglas Fir Exploitation
& Export Co.
260 California St.
San Francisco, Cal.

Our No. 39, page 1.
Date December 8, 1916.
Your Order No. ——.
Dated ——.

Raymond Lumber Company.

Sold to—Comyn, Mackall & Company.

For Account of—

To be delivered at Raymond, Wash.

For reshipment to—

Time of Shipment October to December, 1917.

Time of Delivery do

Total cargo shipped 971
972

Mill tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per confirmation irrespective of original order unless advised to the contrary by you.

vs. W. Leslie Comyn and Benjamin F. Mackall. 85

Pieces.	Feet.	Size.	Length.	Description.
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SCH. "W. H. TALBOT."

100,000 feet B. M. 15% more or less to suit capacity of vessel.

PRICE: \$9.50 Base "G" List, less 21½% & 21½% for cash.

DESTINATION: Australia. (Usual Australian Specifications.)

GRADE: As per "G" list, P. L. I. B. Certificate to be furnished.

DELIVERY: 60 M feet per working day or pay demurrage as provided by Charter Party. [74—12b]

MARKING: Marking if ordered, 10 cents per M, Net Cash.

SHIPMENT: October to December, 1917.

TERMS AND CONDITIONS: As per "G" list.

NOTES: This price is for delivery F. O. B. Mill Wharf, Raymond, Wash., within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf, Raymond, Wash.

Accepted: COMYN, MACKALL & CO.

Per J. CLAUDE DALY.

Dec. 28, 1916.

Please return for our files:

DOUGLAS FIR EXPLOITATION & EXPORT CO.

Note

Refer to E. G.

O. K.—E. R. G.

Thereupon the order for "Vessel to be named," with the acceptance of Comyn, Mackall & Co., was

admitted in evidence and marked Plaintiffs' Exhibit No. 6, which was in words and figures as follows:

Plaintiffs' Exhibit No. 6.

ACKNOWLEDGMENT OF ORDER.

Douglas Fir Exploitation
& Export Co.
260 California St.
San Francisco, Cal.

Our No. 41, page 1.

~~DATE~~ Date December 8, 1916.

Your Order No. —.

Dated —.

Kleeb Lumber Company.

Sold to—Comyn, Mackall & Company.

For Account of—

To be delivered at South Bend, Wash.

For reshipment to—

Time of Shipment ~~October~~—July to December, 1917.

Time of Delivery do

Mill tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per confirmation irrespective of original order unless advised to the contrary by you.

Pieces.	Feet.	Size.	Length.	Description.
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VESSEL TO BE NAMED.

725,000 feet B. M. 15% more or less to suit capacity
of vessel.

PRICE: \$9.50 Base "G" List, less 2½% & 2½%
for cash.

DESTINATION: Australia or West Coast. (Usual
Specifications.)

GRADE: As per "G" list, P. L. I. B. Certificate
to be furnished.

DELIVERY: 60 M feet per working day or pay de-
murrage as provided by Charter Party. [75—
12c]

MARKING: Marking if ordered, 10 cents per M,
Net Cash.

SHIPMENT: ~~October~~—July to December, 1917.

TERMS AND CONDITIONS: As per "G" list,
(Our letter A 425).

NOTES: This price is for delivery F. O. B. Mill
Wharf, South Bend, Wash., within reach of
vessel's tackles and/or on barges A. S. T. Mill
Wharf, South Bend, Wash.,

Accepted: COMYN, MACKALL & CO.

Per J. CLAUDE DALY.

Dec. 28, 1916.

Please return for our files:

DOUGLAS FIR EXPLOITATION & EX-
PORT CO.

Note

Refer to E. G.

O. K.—E. R. G.

It was thereupon stipulated that, subject to cor-
rection in its general statements, the fourth order

(Testimony of W. Leslie Comyn.)

was in all respects similar to Plaintiffs' Exhibit No. 6, "Vessel to be named."

Mr. SUTRO.—I want the record to show that 1,450,000 feet was sold at that time and the vessels not named."

WITNESS.—(Continuing.) At the time this letter was written, December 15, 1916, two of the vessels that were to carry this lumber had not been named. At that time they were not known to me. So far as I know, they were not known to the Douglas Fir. In the acknowledgment of order which has just been offered in evidence with respect to the cargo which we expected to lift by the "Marston," when the order says "Sold to Comyn, Mackall & Co. for account of, to be delivered at Knappton, Washington," it means delivered from mill wharf at Knappton, Washington. That is the Knappton, there is only one mill at Knappton. "Mill tally and inspection to govern and be final" means inspection to be made at the mill wharf before the lumber was taken from the wharf. There would be no difference at all in the inspection if the lumber [76—12d] was loaded on to a steamer or if it was loaded on to a sailing vessel. There would be no difference at all in the inspection if the lumber was loaded on to a barge and not on to a sailing vessel. When it says "1,300,000 feet B.M.," "B.M." means board measure.

"15 per cent more or less to suit capacity of the vessel," as I understand the custom of the trade that was a sale of 1,300,000 feet, 15 per cent more or less. "Destination, Australia. (Usual Australian speci-

(Testimony of W. Leslie Comyn.)

fications)"—there would not be a bit of difference in the specifications if the lumber was loaded on to a barge or on to a sailing vessel, the specifications would be just the same that you gave the mill to cut. We furnished the specifications, we were the buyers. In these contracts the buyer furnished the specifications and the mill cuts according to these specifications.

When the memorandum says, "This price is for delivery f. o. b. mill wharf," it means the price covers delivering that lumber on the mill wharf instead of back away inside the mill. In other words, the delivery was to be on the mill wharf. "f. o. b." means free on board the mill wharf. It differentiates between the mill wharf and the interior of the mill, and that price covered delivery on the mill wharf.

"Within reach of vessel's tackles" means that if you put a vessel alongside there the lumber must be so far up on the mill wharf that the vessel's tackles will reach it. With respect to the place of delivery, the point where the mill had to put the lumber, there would not be a particle of difference whether there was a vessel alongside the mill wharf or a barge. The mill would put the lumber on the same spot on the wharf, whether it was for delivery to a vessel or to a barge. In the expression "And/or on barges A. S. T. mill wharf," I should say "A. S. T." means alongside tackles. I don't know, I never heard of that expression before. [77—13] We never had it

(Testimony of W. Leslie Comyn.)

before in the lumber trade that I know of. I have *had* it referred to as at ship's tackle.

Q. "And/or on barges at ship's tackle mill wharf": What difference in the mode of delivery would there be to the mill if those barges were alongside a ship, or if they were not alongside a ship?

A. If they did that, they would have to load the stuff from the mill wharf on to barges, first, and then put them alongside the ship.

WITNESS.—(Continuing.) Assuming that this was an option in favor of the mill, whether they would deliver on wharf or on barges, and assuming that the mill delivered it to the barges, it would not make a bit of difference in the method of delivering to barges if the barges lay alongside the ship or did not lay alongside the ship; they would have nothing to do with loading that lumber on to the ship. In the case of delivery to barges, the obligation of the mill would cease, and it would have performed its part of the contract when it put the barges alongside the ship, and if there were no ship it would cease as soon as it was on the barges. It would cease as soon as the lumber was on the barges if they sold it on the barges. If the mill had an option to deliver to barges, and it exercised that option, the obligation of the mill would cease when the lumber was on the barges. After that time it would be the obligation of the buyer to take the lumber from the barges, they would have to load it from the barges on to the ship. As a matter of fact, the "Marston" was loaded with a cargo of lumber. These cargoes of lumber that

(Testimony of W. Leslie Comyn.)

were bought from the Douglas Fir Company were not loaded on to the "Marston." We never got this lumber.

Thereupon, a letter dated September 19, 1917, addressed to defendant by plaintiff and signed by Mr. C. L. Daly was admitted [78—14] in evidence, marked Plaintiff's Exhibit No. 7, and was in words and figures as follows:

Plaintiffs' Exhibit No. 7.

"September 19, 1917.

Messrs. Douglas Fir Exploitation & Export Company,

260 California St., City.

Dear Sirs:

'W. H. MARSTON.'

Enclosed we beg to hand you specifications for this vessel, which we trust you will find in order.

You will note that the vessel it to be dispatched to Melbourne, and we will require the following documents:

Bills of lading: Two originals and three non-negotiable copies covering each mark as per form herewith;

Specification: 5 copies covering each mark;

Lumber Bureau Inspection Certificate: 4 copies;

Marine Underwriters Surveyor's Certificate: 4 copies;

Master's Demurrage Release: 4 copies.

Stowage Plan: 4 copies.

Your Invoice: In duplicate.

Very truly yours,"

(Testimony of W. Leslie Comyn.)

WITNESS.—(Continuing.) The bills of lading, specifications, lumber bureau inspection certificate, Marine Underwriters surveyor's certificate, and master's demurrage release, were all of them asked for by us of the defendant. If we had not supplied a vessel there but had put barges there to take this lumber, we would not have required a bill of lading, we would have required specifications. We would have required the Lumber Bureau Inspection certificate. We would not have required the Marine Underwriters' surveyor's certificate. We would not have required the master's demurrage release nor a stowage plan. We would have required the defendant's invoice. In reply to that letter marked Plaintiff's Exhibit No. 7, we received a letter dated September 20th. [79—15]

Said letter was thereupon admitted in evidence and marked Plaintiff's Exhibit No. 8, and was in words and figures as follows.

Plaintiffs' Exhibit No. 8.

“Messrs. Comyn, Mackall & Co.,
310 California Street,
San Francisco.

Gentlemen:

‘W. H. MARSTON.’

We acknowledge your favor of September 19th, received this morning, with enclosures as stated, including specifications for the cargo.

This cargo, as you know, was sold for October–November–December, 1917 loading. The vessel's

(Testimony of W. Leslie Comyn.)

position to-day, as reported in The Guide is 96 days out from the Columbia River for Melbourne. Even should she arrive there to-day she would have very little chance of discharging her cargo and returning to the Columbia River in time to commence loading during December, and, as before intimated to you, under no conditions could we commence loading this vessel later than December, on the old contract, which provides for \$9.50 base 'G' list; therefore, we will hold the specifications in this office for the present, at least, and if you wish will meet with you at any time at your convenience to determine how this cargo is to be handled.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT COMPANY,

By A. A. BAXTER,
General Manager."

WITNESS.—(Continuing.) To the best of my knowledge and belief the "Marston" was at that time bound for Melbourne. There was practically no chance at all for her getting back, unloading her cargo, and getting back to the Columbia River in time to make an October, November or December loading. In other words, in September, 1917, it was known, not only to the Douglas Fir Exploitation & Export Company, according to that letter, but also to us, that she could not get back in time. That is to say, that she could not get back by December, 1917. At that time the "Marston" was under sub-charter

(Testimony of W. Leslie Comyn.)

to us, and that sub-charter was in existence at the time that we made this contract for the lumber. At the time that this letter was written by the Douglas Fir Company we had not made any variations in that sub-charter. [80—16]

Thereupon Plaintiff's Exhibit No. 9 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 9.

"September 21, 1917.

Messrs. Douglas Fir Exploitation & Export Company,

260 California Street,

San Francisco.

Dear Sirs:

We have to acknowledge receipt of yours 20th, A-3062, subject matter. 'W. H| Marston.'

We have no comment at the present moment to make on this matter, beyond the fact to correct your impression that the cargo is bought specifically for October, November, December. Our contract was originally for specified quantity for July to December, and the 'Marston' was one of the boats named to apply on same.

Faithfully yours,

COMYN, MACKALL & CO."

WITNESS.—(Continuing.) Probably that letter referred to the original loading dates in the contract Charles Nelson Company, which specified July to December.

Thereupon Plaintiff's Exhibit No. 10 was admitted in evidence, and was in words and figures as follows:

(Testimony of W. Leslie Comyn.)

Plaintiffs' Exhibit No. 10.

“September 27, 1917.

Douglas Fir Exploitation & Export Company,
Nêwhall Building,
San Francisco, Calif.

Gentlemen:

With further reference to 1,300,000 feet B. M. 15 per cent, more or less, to be furnished by Knappton Mills & Lumber Co. for October, November, December, 1917:

We will take delivery of this lumber f. a. s. mill wharf Knappton and/or on barges a. s. t. Mill Wharf Knappton, in the month of December. Please advise us promptly on what date in December you will make delivery.

Yours truly.”

WITNESS.—(Continuing.) In September, 1917, it was known, both to plaintiff and defendant that the “Marston” could not make its loading date, if the latest date was December 31, 1917. She [81—17] could not discharge her cargo and get back to the Columbia River in ballast in time to load in December, 1917. That would be without any variation from her original sub-charter. The defendant replied to that letter under date of October 1, 1917.

Thereupon Plaintiff's Exhibit No. 11 was admitted in evidence, and was in words and figures as follows:

(Testimony of W. Leslie Comyn.)

Plaintiffs' Exhibit No. 11.

“October 1, 1917.

Messrs. Comyn, Mackall & Co.,
310 California Street,
San Francisco.

Gentlemen:

Order No. 38:

Acknowledging and replying to your letter of the 27th ult. we beg to advise that this order was sold for shipment by the ‘W. H. Marston,’ loading October to December, 1917, and we cannot see our way clear to consent to the change you request, namely, to deliver this f. a. s. mill to a barge, as requested in yours of the 27th ult.

Very truly yours,

**DOUGLAS FIR EXPLOITATION & EX-
PORT CO.**

By A. A. BAXTER,
General Manager.”

WITNESS.—(Continuing.) Order No. 38 was the order number which this cargo had taken. After that letter the defendant always refused to deliver that lumber to us except to the “Marston” within the time of the contract.

Thereupon Plaintiff's Exhibit No. 12 was admitted in evidence, and was in words and figures as follows:

(Testimony of W. Leslie Comyn.)

Plaintiffs' Exhibit No. 12.

"October 10, 1917.

Douglas Fir Exploitation & Export Co.,
260 California Street,
San Francisco.

Dear Sirs:

We have your letter of October 2d.

If we correctly understand your letter, you decline to deliver this lumber to us. In order that there may be no uncertainty about the matter, we demand and notify you that we will take delivery of this 1,300,000 feet B. M. of lumber (15 per cent more or less at your option if you desire), beginning Monday, December 3, 1917, at the rate of 60 M feet per working day. If [82—18] this date is convenient for you we will commence to take deliveries at a later date in December. We give you the option of making the delivery in any manner provided by the contract, to wit, f. a. s. mill wharf, Knappton, and/or on barges a. s. t. mill wharf, Knappton. We request that you specify as soon as possible the day upon which you will commence delivery, and which option, as to manner of delivery you elect.

Very truly yours,
COMYN, MACKALL & CO."

WITNESS.—(Continuing.) In that letter, when we say that we will take delivery of 1,300,000 feet, 15% more or less at our option, by "15 per cent more or less" we mean 15 per cent more than 1,300,000 or 15 per cent less than 1,300,000 at their option. They

(Testimony of W. Leslie Comyn.)

could give us whatever they liked, they could give us 1,300,000, they could give us 1,300,000 and 15 per cent more or they could give us 1,300,000 and 15 per cent less. We tried to be fair with them.

Thereupon Plaintiff's Exhibit No. 13 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 13.

“October 12, 1917.

Messrs, Comyn, Mackall & Co.

310 California Street,

San Francisco.

Gentlemen:

Replying to your favor of the 10th instant, we beg to say that you are mistaken in your interpretation of our position in this matter. We do not decline to deliver to you the 1,300,000 feet mentioned in contract of November 2, 1916. On the contrary, we stand ready to carry out this contract in every particular, but we decline to change the same in the manner suggested by you, or in any other particular.

In yours of the 10th inst. you acknowledge ours of October 2d, which is a mistake, as we cannot find we wrote you on October 2d, on this subject. We think it should have acknowledged ours of October 1st. (No.-3116).

Very truly yours,

DOUGLAS FIR EXPLOITATION & EX-
PORT CO.

By A. A. BAXTER,
General Manager.”

Thereupon Plaintiff's Exhibit No. 14 was admitted in evidence, and was in words and figures as follows: [83—19]

Plaintiffs' Exhibit No. 14.

"October 17, 1917.

Douglas Fir Exploitation & Export Co.,
260 California Street,
San Francisco.

Dear Sirs:

Replying to your letter of the 12th inst., your file A-3229:

We note with satisfaction that you stand ready to carry out our contract with you"—
it says "with you," it should be "with us."

"We note with satisfaction that you stand ready to carry out your contract with us of November 2, 1916, with respect to the delivery of 1,300,000 feet of lumber therein mentioned. We will be ready to accept delivery in December and ask that you designate the date when you will commence deliveries.

Yours truly,

COMYN, MACKALL & CO."

Thereupon Plaintiff's Exhibit No. 15 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 15.

October 19, 1917.

Messrs. Comyn, Mackall & Co.,
310 California Street,
San Francisco.

Gentlemen:

Re Sale of Lumber f. a. s.

‘W. H. MARSTON.’

In acknowledging and replying to your favor of the 17th instant, we desire to make our position clear to you with reference to the delivery of this lumber. Because of the expressed satisfaction in your communication, we infer that you would have us believe that you understand we have acquiesced to your request to make delivery of the lumber in question alongside a barge at mill wharf. If this is your understanding, you are in error, and in order that there may be no possible ground for further misunderstanding our position, we will briefly recapitulate the facts and circumstances of this transaction.

By letter of November 2, 1916, we agreed to sell you four cargoes of fir lumber for export, October to December deliveries, 1300 M feet f. a. s. ‘W. H. Marston;’ 1000 M feet f. a. s. ‘W. H. Talbot,’ and 1450 M feet (combined capacity) f. a. s. two of your own vessels to be named later, loading port to be named by us in ample time to give each loading vessel instructions before she would leave her next previous port of call.

On September 27, 1917, you wrote informing us in reference to the cargo of 1300 M feet to be delivered f. a. s. ‘W. H. Marston,’ that you would take

delivery of that cargo free alongside vessel at mill wharf and/or on barges a. s. t. mill wharf. On [84—20] October 1, 1917, we replied to this letter advising you, in effect, that we would not consent to a change of the contract so as to permit of your taking delivery of the lumber on a barge instead of on the 'W. H. Marston.' Your reply, ten days later, not only interpreted erroneously our refusal as a declination to deliver the lumber at all, but erroneously proceeded to read into the contract an obligation on our part to make delivery to a barge instead of to the 'W. H. Marston.' In our answering letter of October 12th, we hastened to correct your error in interpretation of our former letter, and advised you that on the contrary we stood ready to carry out our contract, though we still decline to change its terms in the way suggested.

The foregoing is a brief statement of the situation as shown by the correspondence, and if it calls for an expression of satisfaction on your part, we are also content, but there must be no misunderstanding. The 1300 M feet of lumber called for under the contract was sold for delivery f. a. s. 'W. H. Marston' at mill wharf, October to December, 1917, loading, and we decline absolutely to change the contract and make the delivery f. a. s. barge at mill wharf.

Trusting that there can now be no possible further misunderstanding of our position, we remain,

Respectfully yours,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By A. A. BAXTER,
General Manager.

(Testimony of W. Leslie Comyn.)

P. S.—If, as we have reason to suspect, you have now found that a mistake was made in contracting for October to December loading for the ‘W. H. Marston,’ and that other engagements will prevent that vessel making her December loading, we shall be glad to take the matter up with you anew under present conditions.”

WITNESS—(Continuing.) The “present conditions” as to the price of lumber at the date of this letter, which was October 19, 1917, were \$22.50 as against \$9.50. In other words, for the same lumber which our contract entitled us to at \$9.50 a thousand, we would have had to pay, under present conditions, as Mr. Baxter called them, \$22.50 a thousand.

Q. In that letter, there is a reference to the mistake that you had made in figuring that the “Marston” could make a loading date in December, 1917. I will ask you if, amongst exporters and shippers of lumber by sailing vessels, to what degree can you, a year, or a year and a half, or two years in advance, approximate the date at which a sailing vessel can make any [85—21] given port?

A. You cannot approximate it. The vessel is entirely dependent on acts of God, acts of kings’ enemies, restraints of rulers, and on wind, sea, and everything else; you cannot approximate it at all, especially during the war period, during the period when the war was on. This was right in the middle of the war period. There was delay at every port. The governments were holding up vessels right and left. You couldn’t tell a thing about it.

(Testimony of W. Leslie Comyn.)

WITNESS.—(Continuing.) To my actual knowledge, during this period there would be hundreds of cases of sailing vessels which were unable to fill engagements for given dates, say for a year or a year and a half in advance. The greater number of ships during 1916 and 1917 were late; they were held up by the Australian government both going down and coming back; the government was taking hold of them and forcing them, in many instances, to bring cargoes back when they were chartered to come back in ballast. It was a recognized fact in the export lumber trade that there was no certainty to be attached to the date that a sailing vessel might make. The Douglas Fir Exploitation & Export Company, from its inception, took copies of charter-parties of sailing vessels which it was anticipated that they would load cargoes upon. The "Guide" which is referred to in one of these papers is a shipping paper edited in this town. The Douglas Fir Company had absolutely the same facility of knowing the whereabouts of sailing vessels as anyone else. It had copies of the charter-parties and they could easily look it up, they have the "Guide" and they have the "Commercial News." I can give you a statement of where the "Marston" went and what she did in 1916 and 1917 if I can refresh my memory from a statement I made up. This statement is taken from the records of the Merchants Exchange. In January, 1916, she was in Adelaide, bound for Newcastle. [86—22] In March, 1916, she was in Newcastle, bound for Port Allen. In June, 1916, she was at

(Testimony of W. Leslie Comyn.)

Port Allen and passed Tattosh July 22d, and arrived in Eagle Harbor August 13th. In September, 1916, she was at Port Los Angeles and was bound for Adelaide, where she arrived December 18th. On January 17th, 1917, she sailed from Adelaide for Astoria, arriving there on May 8th. On June 15th she sailed from Astoria to Melbourne, and arrived at Melbourne on October 4th, and if she had promptly discharged her cargo on October 4th, 1917, at Melbourne, and immediately put about to return to Astoria, she could not have arrived there before January 1st. Under her charter-party, that is under the sub-charter, she was to come back in ballast. That was changed and she brought back a cargo of wheat from Melbourne at the request of the Australian government, from Melbourne to Astoria. She made no deviation at all. As a matter of fact, the loading of that cargo did not delay her over ten days. With respect to the effect on the speed that she would make coming with a cargo of wheat instead of coming in ballast, she would make better speed loaded than she would in ballast.

I recognize the letter you show me dated October 23, 1917, in response to the last letter which has been read, written from my firm to the defendant.

Thereupon Plaintiff's Exhibit No. 16 was admitted in evidence, and was in words and figures as follows:

(Testimony of W. Leslie Comyn.)

Plaintiffs' Exhibit No. 16.

“October twenty-third,

Nineteen seventeen.

Messrs. Douglas Fir Exploitation & Export Com-
pany,

260 California Street,

San Francisco.

Dear Sirs:

We acknowledge receipt of your letter of the 19th inst., file A-3279.

Confirming the writer's telephone conversation with your [87—23] Mr. Baxter yesterday, with reference to the cargo of 1,300,000 feet of Douglas Fir Lumber sold us f. a. s. mill wharf, Knappton and/or on barges a. s. t. mill wharf Knappton.

Please be advised that we will have barges alongside the mill dock on November 25th, next ready to take delivery of said lumber, and in the event of your failure or refusal to deliver, we will buy in the open market, and sue you for the damages sustained.

Very truly yours,

COMYN, MACKALL & CO.,

Per _____.”

WITNESS. — (Continuing.) We put barges alongside the mill dock on November 25th; I mean the mill wharf of the Knappton Mills, ready to take the lumber with our men ready to load it on to our barges. We did not get the lumber; they never cut a stick of it. The stevedores that we employed to take that lumber were Brown & McCabe. The let-

(Testimony of W. Leslie Comyn.)

ter which you show me from the Knappton Mills & Lumber Co., addressed to Brown & McCabe, Stevedores, dated November 28, 1917, is a letter that was forwarded to us by the stevedores. That was the mill that was to cut this lumber.

Thereupon Plaintiff's Exhibit No. 17 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 17.

"Knappton, Wash., November 28, 1917.

Brown & McCabe, Stevedores, Inc.,

Portland, Oregon.

Gentlemen:

We have a notice handed us by your representative from Comyn, Mackall & Co., San Francisco, to deliver 1,300,000' of Douglas Fir.

We have no order to deliver any lumber to barges for account of Comyn, Mackall & Co., and therefore cannot consider your notice.

Very truly yours,

KNAPPTON MILLS & LUMBER CO.

By H. B. SETTEM,

Secretary."

(The letter was marked Plaintiff's Exhibit 17.)

[88—24]

Q. In the practice of the export lumber trade, what difference would there have been in the operation of the delivery of that lumber to these barges if, in point of fact, the Knappton Mills & Lumber Company had delivered it, if the "Marston" were

(Testimony of W. Leslie Comyn.)

lying alongside the barges, or if she was not lying alongside of them? What difference would there have been in the action required of the Knappton Mill & Lumber Co.? A. Not a thing.

Thereupon Plaintiff's Exhibit No. 18 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 18.

“November thirtieth
Nineteen-seventeen.

Messrs. Douglas Fir Exploitation & Export Com-
pany,
260 California Street,
San Francisco.

Dear Sirs:

Referring to our purchase of 1,300,000 Douglas Fir, October/November/December, delivery, at \$9.50 f. a. s. mill dock and/or barges:

This cargo was to be supplied by the Knappton Mills and Lumber Company, Knappton, and on the 26th of this month we had barges alongside their dock ready to take delivery, but they, acting as your agents, refused to supply the lumber. This is a breach of contract.

We are, therefore, compelled to go into the open market and buy against you, and now notify you that we will sue you for breach of contract in the amount of damages sustained by us.

Very truly yours,
COMYN, MACKALL & CO.,
By _____.”

Thereupon Plaintiff's Exhibit No. 19 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 19.

"San Francisco, December 1, 1917.

Messrs. Comyn, Mackall & Co.,
310 California Street,
San Francisco.

Gentlemen:

'W. H. MARSTON.'

We acknowledge yours of November 30th and shall await [89—25] your future action.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EX-
PORT CO.

By A. A. BAXTER,
General Manager."

Thereupon Plaintiff's Exhibit No. 20 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 20.

"San Francisco, January 2, 1918.

Messrs. Comyn, Mackall & Co.,
310 California Street,
San Francisco.

Gentlemen:

'W. H. MARSTON.'

Referring to contract of sale for this cargo, dated November 2, 1916, which provided for October/November/December 1917 loading. As this

(Testimony of W. Leslie Comyn.)

vessel has not yet arrived at loading port and the time has expired by limitation, we beg to now advise we have today cancelled this cargo on our books.

Very truly yours,
DOUGLAS FIR EXPLOITATION & EXPORT CO.

By A. A. BAXTER,
General Manager."

WITNESS.—(Continuing.) The Knappton Mills had not cut any of this cargo; under the practice in the lumber trade, an order of this sort is cut to the specifications furnished by the buyer. We had furnished the specifications for this lumber. As a matter of fact, not a stick of it was cut by the Knappton Mills. It never was cut.

Thereupon Plaintiff's Exhibit No. 21 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 21.

"Sept. 20th, 1917.

Knappton Mills & Lumber Co.,

Knappton, Wash.

Gentlemen:

'W. H. MARSTON.'

The above vessel is ninety-six days out from the Columbia River for Melbourne and even though she should arrive there today there is very little chance of her discharging her cargo and returning in time to commence loading in December. We

(Testimony of W. Leslie Comyn.)

have today received specifications for her cargo, which is an excellent [90—26] cargo to cut being Melbourne specifications, but we are not sending them forward to the mill as every indication is that the cargo will be canceled.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By _____,
General Manager."

Thereupon Plaintiff's Exhibit No. 22 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 22.

"October 8th, 1917.

Knappton Mills & Lumber Co.,

Knappton, Washington.

Gentlemen:

'W. H. MARSTON,' ORDER No. 38:

Referring to our order as above, this vessel arrived in Melbourne October 4th and therefore has practically no chance, after discharging there, of arriving at your mill during December. We have the specification, but have not forwarded it to the mill as we propose to cancel the cargo, but cannot legally do so until the last day of December.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By _____,
General Manager."

(Testimony of W. Leslie Comyn.)

WITNESS. — (Continuing.) Subsequently we bought an equivalent quantity of lumber from Dant & Russell. The contract which you show me purporting to have been entered into between ourselves and Dant & Russell is the contract for the lumber which we bought. It specifies \$22.50 a thousand. That was the market price at that time. It was the best price I could get.

Thereupon Plaintiff's Exhibit No. 23 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 23.
COMYN, MACKALL & CO.
Successors to
BOWRING & COMPANY.
LUMBER CONTRACT.

"Bowring & Company
New York.
Correspondents
C. T. BOWRING & CO., LTD.,
Liverpool, London and Cardiff
———
Bowring Bros., Ltd.
St. John's Newfoundland

Cable Address
'Bowring' San Francisco
———
Codes:
Hinrich's, Watkin's,
Premier, A. I., A. B. C., 5th
Western Union
Lieber's Scotts 10th
and private.

THIS AGREEMENT, made and entered into this 7th day of [91—27] December, 1917, by and between COMYN, MACKALL & CO., of San Francisco, California, as buyers, party of the first part, and DANT & RUSSELL, of Portland—Oregon as sellers, party of the second part;

WITNESSETH: That the party of the first part hereby agrees to purchase, and the party of the sec-

and part hereby agrees to sell One million three hundred thousand (1,300,000) feet B. M. Douglas Fir Lumber merchantable and select (called Oregon Pine), on the terms and conditions as hereinafter provided for:

QUANTITY: As stated above, fifteen (15) per cent more or less at buyer's option, or sufficient to give a full and complete cargo to the vessels chartered to load under this contract.

Price: \$22.50 net (Dollars) U. S. Currency per thousand feet B. M., for such lengths and sizes in rough merchantable and select grade, as are listed in Export G List as base price; all extras and deductions payable as per such list, unless otherwise agreed hereafter.

DELIVERY AND/OR SHIPMENT: At buyer's option, during expected Feby/March/April 1918 according to specification, at the rate of not less than seventy thousand (70,000) feet B. M. per running day, Sundays and legal holidays excluded, free alongside and within reach of ship's tackles. Shipment by *sailer* at buyer's option. Delivery to be made in accordance with usual form of charter-party, and sellers to be responsible to the ship for any demurrage or damages occasioned by their own negligence or default.

PAYMENT: Sellers to send full and complete documents (as required) direct to buyer; buyers to remit in cash within four days after receipt of all documents covering a complete cargo by any one vessel or steamer.

QUALITY: Usual grade of Rough Merchantable and Select Douglas Fir Lumber (other grading conditions as per Export G List).

SPECIFICATION: To be given to sellers not later than Sixty (60) days before estimated arrival of vessel by which such specification is intended for shipment.

Specifications to be prorated, each size proportionately to suit capacity of vessel or steamer chartered or hereafter to be chartered to load under this contract.

INSPECTION AND TALLY: To be made at the expense of the seller by inspectors of the Pacific Lumber Inspection Bureau and its certificate to be final.

Buyers have the right to appoint a private Surveyor or Inspector, who shall have the right to reject any piece or pieces which, in his opinion, are not up to grade. Should the sellers dispute the decision of the Private Inspector, any pieces so in dispute shall be put aside and their grade determined by the Chief Inspector of the Bureau; sellers and buyers to share equally the pay and expenses of such private Inspector.

STOWAGE: If required by buyers, to be supplied by seller in laths, pickets and/or 12 to 15 feet lengths of such sizes and quantities as ordered by buyers. [92—28]

MANUFACTURE: The lumber purchased hereunder to be that of the manufacture of some reputable Columbia River Mill, and the party of the

(Testimony of W. Leslie Comyn.)

second part agrees that the lumber shall be evenly sawn, and properly trimmed.

Buyers not to be responsible for any consequences arising through the delay, damage or loss of the vessel (s) chartered to load under this contract, nor for the failure of the vessel or her owners to fulfill the charter-party, nor for breach of charter-party on the part of vessel, its owners and/or agents.

To the true and faithful performance of each and all of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, each to the other in the penal sum of actual damages.

IN WITNESS THEREOF, we have hereunto signed our names.

Executed in Triplicate.

Witness:

B. M. WADE.

COMYN, MACKALL & CO.,

By CLAUDE L. DALY."

WITNESS.—(Continuing.) The difference between the contract price for the lumber that we had to pay to Dant & Russell and the contract price we would have paid to Knappton Mills if they had carried out their contract with us, was that one was \$22.50 net and the other was \$9.50 less $2\frac{1}{2}$ and $2\frac{1}{2}$. It figures out \$17,511, that is the difference in price for the 1,300,000 feet of lumber. To the best of my knowledge and belief that is the difference between the price we actually paid for the lumber and

(Testimony of W. Leslie Comyn.)

the price we would have paid if the Knappton Mills had delivered it. I have not personally worked it out, it was worked out in my office. I verified our complaint. I believe that it is alleged there that the difference was \$17,511. We furnished that figure to you. I didn't work it out personally in the office, but it was worked out by my office. The allegation in the complaint that we expended \$304 in preparing to take delivery of this lumber on the barges is true. I have testified that we had a sub-charter on the "W. H. Marston." That subcharter was made up by us prior to the time that this contract was made for this lumber. [93—29]

Q. Prior to the month of October, 1917, and prior to the time that Mr. Baxter wrote you substantially that he would not deliver this lumber except to the "Marston" within that year, was there any modification or change made in that sub-charter.

A. None at all by us; may I make an explanation?

Q. Yes, certainly.

A. The boat was originally chartered by J. J. Moore, from the owners. She was sub-chartered to us by J. J. Moore. J. J. Moore approached us and wanted to load that vessel with wheat from Melbourne to Astoria. We asked Mr. Baxter if he would object, and he said yes, he would object. That was before any question came up as to the boat not being on time—because he wanted to get out of his contract if he could. We said to Moore, we are not varying this contract. If you can make

(Testimony of W. Leslie Comyn.)

an arrangement with Mr. Baxter yourself so that you can vary our contract, as well as your charter, you can go ahead and do it. Then J. J. Moore offered Mr. Baxter \$2,500; we didn't offer Mr. Baxter \$2,500.

WITNESS.—(Continuing.) We didn't offer it to him. J. J. Moore & Co. offered Mr. Baxter \$2,500; they were the original charterers; we were the sub-charterers. Under the sub-charter, after the "Marston" reached Melbourne, she was to return in ballast. In point of fact, she returned with a cargo of wheat. That was a modification of the sub-charter. That modification was made only after Mr. Baxter had positively declined to deliver that lumber to the "Marston." It was long after we knew that the "Marston" could not make the loading date, December, 1917. We received a consideration for permitting the "Marston" to load wheat instead of coming back in ballast. It was admitted by everybody that whether she would come back in ballast or whether she would be loaded with wheat, she could not have gotten here by December 31, 1917. It [94—30] was only when he declined to give us that lumber that we said there was no use throwing good money after bad. The letter which you show me to refresh my memory from J. J. Moore & Co., dated October 17, 1917, fixes October 17, 1917, as the exact date when we agreed to this change in the course of the "Marston" by which she was to take wheat instead of coming back in ballast. We received \$5,000 for agreeing to that. [95—31]

Testimony of C. E. Dant, for Plaintiffs (In Rebuttal).

C. E. DANT was called as a witness on behalf of plaintiffs in rebuttal, out of order, and being first duly sworn, testified as follows:

My name is C. E. Dant, and I reside in Portland, Oregon. I am in the lumber business, being actively engaged in the export lumber business and in the domestic business. I am not interested in any lumber-mills. I export lumber for mills that are not in the combination known as the Douglas Fir Exploitation & Export Company. I buy from such mills. I have been in the lumber business in Portland for seventeen years. I should say that I do an export business with an annual volume of approximately 100,000,000 feet, buying and selling 100,000,000 feet annually. The ships which we handle are handled over and over again, being the same ships, but I should say that we handle annually 50 cargoes anyway, and have done this for the last two or three years. We have a very active business, and have had since prior to the time of this controversy, which arose in 1916. The f. a. s., which is an expression in the contract introduced in evidence here, means free alongside the mill wharf. Standing by themselves, the initials, or those three letters, mean "free alongside." If it says "f. a. s. vessel" it means free alongside on the mill wharf where the vessel can get it. If the delivery is on barges it is the same thing. With reference to the obligation of the seller, if he says he will make a delivery f. a. s. vessel or f. a. s. mill wharf, it means

(Testimony of C. E. Dant.)

just that he will put it on the wharf where the buyer can come and get it, or the vessel can, or the barge. After he has put it on the wharf he has no obligation.

I am familiar with the purchase and sale of cargoes of export lumber for sailing vessels. It is sometimes customary to name a sailing vessel in the contract at the time the order for lumber is placed. You could not tell very closely in my business in 1916 [96—32] at approximately what date a sailing vessel could make a loading port, a year and a quarter forward. So many things happen to a sailing vessel. In my business I have known it very often to be customary to substitute vessels where the sailing vessel named could not make a loading port, or was lost or disabled. That is very often done. I am familiar with the organization known as the Douglas Fir Exploitation and Export Company. Prior to October, 1916, when that company commenced active operations, I knew of cases where a cargo of lumber was bought and a sailing vessel was named and the cargo to be taken at a certain period or certain time, and the sailing vessel could not make that date. I have known cases in which the time for that vessel to take delivery of that cargo was extended. I have known such cases frequently.

Mr. SUTRO.—Q. Do you know of any case in your experience, prior to October, 1916, where the seller of lumber refused to extend the time for de-

(Testimony of C. E. Dant.)

livery because the vessel could not make the loading date?

Mr. McCLANAHAN.—I object to that as immaterial.

Mr. SUTRO.—I don't know whether it is or not. The purpose is to show that we had no recourse but to take the lumber on barges. They said that they would not give it to us after the date named.

Mr. McCLANAHAN.—But that was because of the contract.

Mr. SUTRO.—You stood on your contract.

The COURT.—Let him answer.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 3.

WITNESS.—(Continuing.) I know of no such case. Lumber is sometimes delivered, in the ordinary course of business, to barges. We have delivered it on barges several times. When liners are loaded at Puget Sound or the Columbia River, they are sometimes loaded either from barges or sometimes they go to the mill wharves. In [97—33] in October, 1916, there was no custom in the lumber trade which entitled a mill to refuse to deliver a cargo of lumber because a vessel that had been named by the buyer as the vessel in which it expected to export that lumber was not tendered. If there was such a custom I never heard of it. There was no custom that I know of at that time which entitled the mill to refuse to make delivery to barges of a cargo of lumber where the

(Testimony of C. E. Dant.)

vessel that had been named by the buyer was not produced. There was a custom under which the mill was required to deliver a cargo of lumber that had been contracted for, where a vessel had been named, either to that vessel at a date later than her loading date, or to barges, within the time fixed in the contract. I think that that custom was well established.

Mr. SUTRO.—Q. Did you, yourself, make delivery to barges, where the vessel that had been named could not make the loading date, and the mill refused to permit the substitution of another vessel? Have you done that?

A. The mills never refuse, but we have delivered on barges.

WITNESS.—(Continuing.) We have delivered on barges where the dock would be blocked up with lumber and the mill wanted to get rid of it. We have taken it off on barges and stored it until the vessel arrived. I think that since the war started probably between sixty and eighty per cent of the sailing vessels taking cargo under lumber contracts such as the contract here in controversy have been late. As a custom of the trade, I think that the mill is entitled to insist on delivery within the time specified in the contract, but it is not entitled to insist that the buyer, after the mill delivers the lumber to him, put it on a ship that has been named. The mill does not put lumber on the vessel; it puts it on the wharf, and the buyer takes it. With regard to whether it is more convenient for the seller

(Testimony of C. E. Dant.)

to take it to barges, or alongside the mill wharf, or to take it to a vessel, I think it is just about the same. It is a [98—34] little easier on barges. It is a little easier for the mill. They can take it faster on barges.

Mr. SUTRO.—Q. According to the custom of your trade, and all my questions relate to October, 1916, was there any custom with respect to the quantity that a contract covered which called for, say, 1,300,000 feet, 15 per cent more or less, to suit capacity of vessel, if that vessel was not produced?

A. Then they would deliver the exact amount, approximately.

WITNESS.—(Continuing.) If some other vessel were produced they would deliver the exact amount. I sell for lumber mills as well as buy for them.

Cross-examination.

I am what is called one of the outsiders in the trade, and by that it is meant that I am a man who is not affiliated in any way with the Douglas Fir. They won't sell to us, and I think that is the position of Comyn, Mackall & Company—that they are outside the combination. Comyn, Mackall & Co. and I belong to the outside group of exporters. So far as we are concerned, it is a friendly rivalry between us and the Douglas Fir; that is, so far as Dant & Russell are concerned. I cannot say that there is any feeling between us and the Douglas Fir.

I have had considerable experience in exporting lumber. Most of my sales are of cargo lots or parcel shipments. When I purchase lumber I send the mill

(Testimony of C. E. Dant.)

an order for it, part of which is a printed order, and part of which we fill in. It is a regular form which we have. Sometimes we buy cargo lots and name the carrying vessel in the order. That has quite often been done by us. At the present time steamers carry more of the cargo business than sailing vessels. In 1916 and 1917 steamers and motor ships and sailing vessels carried most of it, anything that we could get hold of. In making a contract for a cargo lot to a named sailing vessel, putting in the contract [99—35] the name of the sailing vessel is merely an incident. At the time we put that in we expect that that vessel will be the vessel that we will load. That is the expectation of both the buyer and the seller. Our contracts where we have named a sailing vessel to carry the cargo, with the expectation that she will carry it, generally provide for some long period, which we will call the delivery. They usually do, such as 60, 90, 100 or 120 days. The object of providing that long delivery date is the estimated time that the vessel will arrive at the loading port.

Mr. McCLANAHAN.—Q. This order, then, with the long delivery date, the named carrying vessel, and the amount of lumber purchased, is sent to the mill; is there any benefit that the mill derives in such an order through the naming of the vessel?

A. They can look the vessel up if they choose to keep track of the vessel.

WITNESS.—(Continuing.) They can find out when they will be called upon approximately to fur-

(Testimony of C. E. Dant.)

nish the lumber. When they want that information they look up the position of the vessel, and they do that by an examination of the shipping papers, what we call the "Guide." The "Guide" is a recognized shipping journal which keeps track of the movements of sailing vessels. When the mill has this order presented to it, that they are apt to be called upon in 90 days for the delivery of a certain amount of lumber to a particular named vessel, they can look up in the "Guide" and find out approximately where that vessel is and then approximate when she will be due at the loading port. That is of value to the mill, in that it gives the mill some idea as to when it shall commence to cut and have the lumber ready. This lumber is all sold under specifications when it is sold to Australia. These are called "Australian specifications." Until the new list was adopted I was selling lumber in 1916 and 1917 under the "G" list as the base. I do not know when [100—36] the new list was adopted. There is now an "H" list also, but at that time, in 1916, assuming that the "G" list was in force, I sold lumber under the "G" list. The cargo which we are speaking of was sold under the "G" list, and the "G" list furnishes the base price for the specification lumber to be loaded on the vessel. The Australian specifications are specifications of different lengths, breadths and sizes of lumber. When you sell lumber under "G" list, this base price of "G" list is the basis from which you derive the price of different sizes, lengths and breadths of specifications. It does not mean, for in-

(Testimony of C. E. Dant.)

stance, if "G" list base price was \$9.50 that all specification lumber was sold at \$9.50; but it does mean that \$9.50 is taken as the base and that from that you figure what the different specifications, lengths and breadths and sizes are to be invoiced at. These provisions in the "G" list were provisions for the benefit of both the buyer and the seller. The "G" list is and was one for the pricing of lumber sold for export. Generally, our contracts for cargoes, where they are for a named vessel, estimate the amount of the lumber that that vessel will carry. That estimate of the amount of lumber is put down in so many figures, and it is customary to add to the estimate a limitation of 15 per cent or ten per cent more or less. It is also customary in our contracts to add after the expression "15 per cent more or less," or a certain per cent more or less, to suit the capacity of the vessel. In these sales of cargo lots to Australia made under specifications and made under the terms of "G" list, the idea prevails that a vessel is to be furnished for the carrying of the lumber. I would say that the particular term respecting the place of delivery of the cargo is a matter of contract between the parties. They can contract to deliver almost anywhere they please. They can contract for the seller to deliver the lumber almost anywhere. I understand that the contract which we have been talking about is [101—37] what is called an f. a. s. contract. It is known to the trade as an f. a. s. contract. The "f. a. s." distinguished this from an f. o. b. contract, which would be different. An f. o. b.

(Testimony of C. E. Dant.)

contract is more aptly a contract which applies to land transactions; "f. a. s." is a water contract, or a contract that applies to water-borne commodities, but "f. o. b." might mean f. o. b. the vessel. It is more common to use "f. o. b." in connection with railroad trains and with warehouses and with things of that kind, and "f. a. s." is used in connection with water-borne commodities. I have superintended or supervised the loading of vessels. In summer a vessel will take more than it will in winter, and the amount which the vessel takes depends somewhat upon the way she is stowed in the hold. The amount which the vessel takes depends also upon the height of the deckload, and the height of the deckload, in turn, is controlled by the discretion of the master of the ship and the surveyor. The same vessel will vary in the height of her deckload. If the stowage is poor, then they could not take so much of a deckload. It is a question of stability. It might be that the amount which a vessel takes is controlled somewhat by the condition of the lumber at the time she is loaded, as to whether it is wet or dry, it being a question of weight. Wet lumber weighs more than dry lumber. Sometimes you will get dry lumber in the hold and wet lumber on top, and then she will carry less than if it were all wet; that is to say, if it were all wet she might carry less than if half was wet and half was dry. If you had the dry lumber on the bottom, she would not carry a big deckload. So that the condition of the lumber at the time of loading is a small

(Testimony of C. E. Dant.)

factor to be put in the question of how much the vessel could carry. The season of the year makes a little difference with the carrying capacity of the same vessel. No matter how well a vessel may be known to you, or how often you have used her, you can only approximate what she will load at a given time, within 5 or 10 per cent, [102—38] maybe. I have known sailing vessels to carry 40,000 or 50,000 feet more at one time than at another. In this hypothetical contract which we have been speaking of, although there is a named amount of lumber governed by the limitation of 15 per cent or less, you could not exactly tell just what that contract is going to invoice until the lumber is actually put into the vessel in the specification lengths, breadths and sizes. If you have a contract that calls for specification lumber to suit the capacity of one ship, you could not tell exactly whether that contract lumber will load into another ship, unless you know what the contract ship will carry. It is all a question of approximation, and when you put into the sales contract of a cargo "f. a. s." for a named vessel this definite number of feet 15 per cent more or less to suit the capacity of the vessel, it is simply what the parties have agreed upon as approximately what they believed the vessel would carry. If that vessel did not come, and we had a contract for 1,300,000, we would deliver the exact amount then. When I say "We," I mean Dant & Russell or any of our mills, any of the outside mills. If the contract calls for a named vessel, as the seller I am privileged to change it to

(Testimony of C. E. Dant.)

something else. There would be no generosity about it; I would simply be delivering the lumber I sold. The lumber I sold would be 1,300,000 feet, if that is all I had sold. Supposing that my contract was 1,300,000 feet plus 15 per cent more or less to suit the capacity of a named ship, we would deliver the 1,300,000 feet. We never get down that fine. The contract was for either 1,300,000 feet, or more or less, to suit the convenience of the size of the vessel. I would say 15 per cent more or less, but if the vessel did not come, then I would deliver 1,300,000 feet exactly. If the vessel did not come, and I delivered 1,300,000 feet, there would be no necessity for my inserting in the original contract "15 per cent more or less." With reference to the delivery of an f. a. s. cargo, it is the custom [103—39] to deliver it on the mill wharf f. a. s. the wharf, on that portion of the wharf where it can be loaded from the mill wharf on to a vessel or a barge or where the buyer can come and take it, and if it is a named vessel it is the custom to load it on to the wharf where the named vessel can take it at her tackles, or any other vessel. If the contract calls for a named vessel, that is a mere incident, that has nothing to do with it.

Mr. McCLANAHAN.—Q. You still, however, say that it is a benefit to the mill to have a named vessel in the contract in order to be forewarned and forearmed as to when he will have to have the cargo ready?

A. He knows he has to deliver that lumber in a certain time; if the vessel is late, and he chooses to wait for it, all right.

(Testimony of C. E. Dant.)

WITNESS.—(Continuing.) If the certain time was November/December, he could keep track of that vessel, or if it suited him or he wanted to demand that the buyer take the lumber at that time, he could do it, and he would do it if the mill objected to waiting for the vessel—the buyer would do it. It would be customary, so far as I know, for the mill to wait for the vessel, but sometimes they would have the lumber cut, or they would want to cut it at a certain time, and they have insisted that we move it within the sales date; for instance, October/November/December. In such cases we have then taken the lumber on barges and stored it somewhere until the vessel arrived. With regard to whether or not there is a custom which requires a mill to cut and have ready the contract lumber at any time within the October/November/December delivery period that the seller may demand, we usually keep closely in touch with the mill and tell them when we want the lumber. There is a custom that the buyer can demand from the seller a delivery of the lumber at any time during October/November/December delivery period, giving him reasonable notice. If he sold for a certain vessel, and that vessel was going [104—40] to get there within the delivery date, then he would keep track of the vessel and be ready for it when it came. That would be the custom. With regard to whether a custom overrides the contract, that is a matter of law. I am not a manufacturer of lumber. When I say that I have delivered lumber on barges I mean that I sell for the independ-

(Testimony of C. E. Dant.)

ent mills, the same as Mr. Baxter does for the combine. I place my order with the independent mill, and the independent mill has made delivery on barges. They have done that in contracts for cargo lots. The circumstances under which this was done were that during the war we had a lot of railway ties going to England and the boats were commandeered. In one case they were the boats named in the contract, and we took eight or ten barges and loaded that stuff up and took it down to Kalama, about 40 or 50 miles down, and stored it on the docks there until the buyers could get a vessel, and that was for the benefit of the mill and the buyer, too. We could have sold those ties at double the money. The mill had some of the ties and they cut out the balance. The mill was allowed to put the ties on to barges furnished by the buyers. It was no accommodation; the mill would have been glad to keep them. That was because the price was higher. I can give you other instances if you want them. This custom with reference to the delivery of cargo lots is recognized among the mills in the north. It was recognized among all the mills until the combination tried to change it. I do not know, but apparently it is not the custom of the combination. With regard to what proportion of the mills is represented in the combination, I think they probably ship about 50 per cent. I would not say that 85 per cent of the export mills are represented in the combination. Some of the outside mills are very large ones. I presume that of the mills that ordinarily have done the ex-

(Testimony of C. E. Dant.)

port business 50 or 60 per cent are in the combine. I said that this custom that I speak about is recognized by all the outside mills. I said that [105—41] the combination mills have tried to change it. Prior to the time of the formation of the combination, as I understand it, all of the mills recognized this custom. In November and December, 1916, it was all taken out of their hands then and put into the hands of Mr. Baxter. In November and December, 1916, all of the independent mills recognized this custom, so far as I know. That would be 40 per cent. Those mills are on this coast, and I am speaking only of export mills. When we insure these cargo lots of lumber, we have sometimes insured the cargo for the buyer on the wharf after we have moved it. In a case where the delivery is f. a. s. vessel mill wharf, it depends entirely upon your sale. If we have sold it on the mill wharf and get the stuff ready for the buyer, he might want to insure it, because if he was late he might want to insure right there to cover any question. This year we had a couple of cargoes of big shooks going to Honolulu. We put them all on the dock at Astoria. It came to a couple of hundred thousand dollars. The boats were late. We took it up with the buyer and notified him that the cargoes were on the docks at Astoria, and he asked us to have them insured. Ordinarily, the delivery of a cargo under an f. a. s. contract is effective only after the lumber is placed in the slings of the exporting vessel, because ordinarily it comes right on to the vessel. If the buyer furnished the vessel on time,

(Testimony of C. E. Dant.)

his insurance would take effect at the time the lumber is placed in his possession. Ordinarily, so long as the cargo remains upon the dock and has not passed into the slings of the vessel, the insurance attaches on the dock in favor of the seller. It would not be possible right down to the fine point to deliver to a barge or barges the specification lumber that would suit the capacity of any named vessel, unless you knew what the vessel's capacity was. In loading the barge with such lumber we would measure up the amount we had sold and put it on the barge. We would put it on any way, to make [106—42] her staple. In loading that lumber on a vessel we would perhaps stow it different and in a better way than if we loaded it on the barge. If the barge were large enough you could stow on one barge the carrying capacity of the "W. H. Marston." Usually, I think that they take about 500,000 or 600,000 feet, and if the "Marston" took 1,300,000 feet, or anything like that, you could not load on one barge her capacity. You would have to put it on two or three. In loading those barges one at a time, or all together, the matter of how the vessel would stow that same cargo would have nothing to do with it, because you would take the lumber off the barge on to the vessel, just the same as you would from the dock on to the vessel. I would load the amount called for in the contract, without reference to the carrying capacity of the vessel. It would be approximately that amount. I would not simply load approximately what the carrying capacity was; I would load

(Testimony of C. E. Dant.)

1,300,000 feet. I would load 1,300,000 feet in case the vessel was not there.

I loaded the "Marston." This cargo that was sold under the contract in suit for the "W. H. Marston" was purchased of me. There was a cargo purchased from us. That is my contract which you show me. The cargo was loaded on the "W. H. Marston." I do not know, without looking at it, whether it was loaded on May 6, 1918, or not. You see, a vessel like that is quite a while loading. It might be thirty days. I do not know that this contract calling for 1,300,000 feet was not loaded on the "Marston." I know that we loaded on the "Marston," but I don't remember what she took. I don't know that she did not load 1,300,000 feet. I do not know whether she loaded more or less. They never do load exactly the amount. I presume that we furnished an invoice for this cargo, but I have not it with me. The cargo was loaded according to the Australian specifications furnished me. I do not know whether those specifications were the same specifications furnished to the Douglas [107—43] Fir. This invoice, which I do not remember about, would be based upon and made up from the "G" list as a basis, and the prices on which the figures on the invoice ultimately came to would be the different prices under "G" list applying to the different sizes and breadths of lumber in the invoice. It would not matter whether the specifications were the same or not, because we would charge the base of what we shipped, the same as the Douglas Fir would. We

(Testimony of C. E. Dant.)

would charge for the different lengths and sizes that went into the "Marston." The prices for those different lengths and sizes would be different. I am sure that the vessel was loaded to her capacity, but we keep on loading until the captain or the surveyor stops us. Our contract calls for a complete cargo for the vessel. The "Marston" was loaded in Portland at the Inman & Paulsen Lumber Company. This company is not one of the combine, it being an outside mill.

Mr. McCLANAHAN.—Q. An outside mill?

A. Yes.

Q. This contract of yours for this cargo for the "Marston" embodies the terms under which you usually make f. a. s. cargo sales for export?

A. That is Mr. Comyn's contract, which I presume he signed.

WITNESS.—(Continuing.) In the usual course of business we would sign these contracts in duplicate. Sometimes we do not. For all that I know, this contract was carried out and the invoice was based on the actual amount loaded on the vessel. I do not know how much that was.

Mr. McCLANAHAN.—Q. Why didn't you invoice to the buyer 1,300,000 feet?

A. We invoiced the amount we shipped, whatever that was.

WITNESS.—(Continuing.) It was the cargo for the "W. H. Marston" that we shipped. We invoiced whatever we shipped. There is [108—44]

(Testimony of C. E. Dant.)

nothing in our contract about the nonappearance of vessels. We have very little in our contract.

This information which is contained in the "Guide" as to the movements of sailing vessels is one which is open to everybody who takes the "Guide." I suppose that the naming of a vessel in a f. a. s. contract gives to the seller some measure of assurance as to when he will have to cut that lumber. In a sale made under the "G" list by the Douglas Fir Exploitation and Export Company, the naming of an export vessel gives to the seller some measure of assurance that the lumber will be exported. They know that it will be exported because it is always higher priced than domestic, and you could not sell it domestic. I presume that the naming of an export vessel as the carrying medium or the receiving medium for the cargo gives to the Douglas Fir some measure of assurance that it will be exported. I do not know that the Douglas Fir cannot handle Douglas fir except for exporting it. I could point out a case where the Douglas Fir did sell that lumber for other than exporting. The price is usually higher for exporting. The specifications are different. They would not want it any place else.

Redirect Examination.

You cannot sell the Australian specification lumber in this country. During the war the Douglas Fir handled a large number of aeroplane cants that went to the aeroplane factories. I have said that I have known of cases where the quantity estimated

(Testimony of C. E. Dant.)

was exceeded by 40,000 feet. That would be about 5 per cent of the ordinary sailing cargo. If you had a 15 per cent more or less clause, the excess of 40,000 feet over the stated amount would be within 15 per cent. We are in competition with Mr. Comyn in business. I think that it is active competition. I have heard of innumerable cases of sales f. o. b. vessels or f. o. b. steamers. We have chartered it that way ourselves. It is a usual term in the business. In [109—45] the export lumber trade on Japanese steamers we usually charter that way. An f. o. b. sale does not necessarily mean a land sale. The case that I told of, where ties had been sold for delivery to a vessel which could not make the loading date, was one which concerned the Inman-Paulsen, the North Pacific, and the St. Johns Lumber Company. The ties, upon the vessel not making the loading date, were delivered on to barges. I do not know just what the difference in the value between the ties at the time they were loaded on to the barges and the contract price would be, but we sold them very cheap, at, I think, about \$9.50, and they went up to about \$37.50. They were worth double anyway. The difference in money would total about \$50,000. Those ties were delivered to barges. A part of the ties had been cut at the time that it was ascertained that the vessels could not make the loading date. The mill proceeded to cut the balance of the ties when we got ready to move them on the barges. The mills did not have all the

(Testimony of C. E. Dant.)

ties cut at the time it was known that the vessels could not make the loading date.

Another instance of delivery to barges where the vessel was late for a loading date was in the case of the schooner "George E. Billings." We made a sale for that boat, that vessel being named. She was late, so the mill insisted that they would not make delivery after the contract had run out, so we put barges alongside, and they loaded the barges, or they gave us the lumber and we loaded it on the barges and took it up to the Pacific Coast Coal Company's dock and discharged it there.

Mr. SUTRO.—Q. Who was the buyer in that case.

A. Neal Nilson. He was buying for the Australian government.

WITNESS.—Continuing.) The quantity of lumber involved in that contract was, if I remember rightly, about 1200 or 1300 feet. That lumber was loaded on to barges. The customs which I have testified to were the customs of the mills, so far as I know, prior to the [110—46] combination, or prior to the time that the Douglas Fir Company became active, about November or December, 1916.

Recross-examination.

The sale of the ties I speak of was made under a contract, and the sale of the "Billings" cargo was under a contract. I have not those contracts with me. I was a party to those contracts, in that I represented the mills or the seller.

Testimony of W. W. Payne, for Plaintiffs.

W. W. PAYNE was called as a witness on behalf of plaintiffs, and being first duly sworn, testified as follows:

I am a lumber merchant connected with the Pacific Export Lumber Company, with headquarters at Portland, Oregon. My residence is Portland. I have been engaged in the lumber business about fifteen years, and have been in the export lumber business since 1906 with the Pacific Export Lumber Company. I might say in a general way that I have been with them constantly. The Pacific Export Lumber Company handles approximately 50,000,000 feet annually, I suppose. Occasionally we have had to handle cargoes on vessels. We have represented both the buyer and the seller during our experience. Our general business is that of buyers. We represent the buyers. Prior to November, 1916, we bought generally and not from any particular class of mills. After the organization of the Douglas Fir Exploitation and Export Company, our purchase from mills was restricted, in that we bought from what was known as outside mills at that time. We did buy some from the Douglas Fir up to a recent date. In the trade the term f. a. s. stands for free alongside ship. It is a general term which means free alongside the carrier, whatever you are going to take it from. F. a. s. mill wharf means that the seller is to put the lumber along on the mill wharf, where it can be taken by the carrier. In my opinion, an interpretation of that phrase it does not make any

(Testimony of W. W. Payne.)

difference what kind of a carrier [111—47] it is that takes it. I have seen the “G” list. I have not any definite recollection of the wording of that list.

Mr. SUTRO.—Q. The term is there defined as “free alongside”; is that a correct definition of the term f. a. s.?

Mr. McCLANAHAN.—If the Court will turn to the “G” list, I think you will find that that is not an exact statement of what that means.

The COURT.—Free alongside within reach of ship’s tackle. There seems to be two definitions, or a division there. It says, “Free alongside,” and then there is a semicolon, and then it says, “within reach of ship’s tackle.”

WITNESS.—(Continuing.) I have known of lumber that was sold under export contracts, where the vessel was named. I have known of cases where the vessel was named and was late in making the loading date. According to the custom of the trade in October and November, 1916, with reference to waiting for a vessel that had been named and could not make her loading date, there is no particular reference to those special dates. In our business, if a vessel was late, when she got there she got her cargo. It was the custom to load the vessel although she arrived late, so far as I know. That would be my idea of it. I did not know of any custom in October, November and December, 1917, which would enable a mill to refuse to deliver a cargo of lumber or a lot of lumber that had been sold, merely because the vessel could not make her loading date.

(Testimony of W. W. Payne.)

It never came up in my experience. There is nothing very unusual about the delivery of lumber sold under an f. a. s. contract to barges. In many cases I have known of cargoes of lumber that were sold under f. a. s. contracts to be delivered to barges. The custom of the trade, so far as I know, in October and November, 1916, where a contract was made for a named vessel to take delivery of a cargo in October/November/December, 1917, and where the vessel was found by both parties to be unable to [112—48] reach the loading port within the period October/November/December, 1917, was that you could take your lumber, and if you had to ship it in a specified time, if the vessel did not get there you got it out by some other carrier.

Cross-examination.

With regard to whether it is all a matter of contract, I was just speaking about general custom. That is my idea of the general custom, as I have just recited it. If the doing of it would create a custom, I would say that there is a general custom in regard to substituting another vessel for a named vessel, because it has frequently happened. That is just what I have seen done. If the contract uses the expression "f. a. s. mill wharf within reach of vessel's tackle," I do not think that there is a custom in the trade that requires under that contract the actual presence at the mill wharf of the named vessel. There is no custom, as I see, that would make it necessary for us, for instance, to put our vessel in

(Testimony of W. W. Payne.)

there. If I was making that kind of a contract, I would understand that I was agreeing with the mill to put the lumber in a certain position on the wharf. "F. a. s. ship's tackle" means that they could not put it back in the yard. That means they have to put it on the face of the wharf, where we could get it, say within 60 feet. It was the intention, of course, where the contract was for that kind of delivery to a named vessel, when the contract was made, to have the vessel there. That would be the custom. You would name the vessel so they would know the position of her. I would dispute that f. a. s. as applied to contracts where the vessel is named, and where the lumber is to be taken at the ship's tackle, requires the actual presence of the ship. I could not coincide with that view; it is contrary to my experience. My experience with reference to that kind of a contract has been that they would say, "Come along and take the lumber, there it is, get it yourself." That has been [113—49] my experience. I am telling you what I know has happened. Of course, if there is a technicality, and they are drawing up something and trying to name some specific vessel, there might be some specific reason for it. For instance, it might be a large vessel, a small vessel being named, and if you wanted to take in a big liner and wanted to take up all the space of the dock, then it might be the custom to have that vessel there.

Mr. McCLANAHAN.—Q. Mr. Payne, in f. a. s. contracts, where a vessel is named as the carrying

(Testimony of W. W. Payne.)

vessel, and there is also in the contract a definite number of feet of lumber named, followed by the expression "15 per cent more or less, to suit capacity of the vessel," it is not customary, under that kind of a contract, that the vessel shall be loaded to her capacity before ascertaining the amount of lumber sold?

A. The amount of lumber is ascertained piece by piece, as it goes on the ship, you understand.

WITNESS.—(Continuing.) When she is loaded, you know what the sale is for. I should say that it was an established custom. With regard to whether or not you could tell how much lumber had been sold under the custom, before you had finished loading the named vessel to suit her capacity, you could tell every night how much you had on the ship. When you have finished loading to capacity, then, and only then, can you tell how much is sold.

**Testimony of W. Leslie Comyn, for Plaintiffs
(Recalled—Cross-examination).**

W. LESLIE COMYN was recalled as a witness on behalf of the plaintiffs for further cross-examination, and having been previously duly sworn, testified as follows:

I have been engaged in the exporting of lumber since 1901. I am a manufacturer of lumber at this time. The name of my mill is the Dominion Mill Company. It is not running. It has been shut down about a week or ten days. I am familiar with the loading of [114—50] sailing vessels. I know that

(Testimony of W. Leslie Comyn.)

the carrying capacity of a sailing vessel varies. On some occasions she will load a slightly different amount of lumber from the amount she would load on other occasions. I have found that she will do that slightly, from my experience. "F. a. s." means free alongside on the face of the mill wharf, within a reasonable distance of the face to be taken on. It means right on the wharf itself. You could not deliver it alongside the mill. That is what it means on the face of the mill wharf. Free alongside mill wharf means alongside the mill wharf. It would be delivered alongside the mill wharf in the water, if a man wanted it that way and got his mill to do it. It also means on the mill wharf itself. When it means free alongside on mill wharf itself, the subject matter of the receiving means is the price. That is included in the price, delivered right on to the mill wharf. All free delivery is made on the price. The price is with free delivery. With regard to what object the delivery is to be made to when the lumber is put on the mill wharf, the free part of it is the price. It is free as to any additional charge, as coming out and being put on the mill wharf. That is free alongside the mill wharf, the face of the wharf. I have not stated that alongside meant in the water. You asked me if lumber could be delivered free alongside the mill wharf in the water, and I said yes, it could. "F. a. s." does not mean alongside in the water, unless you asked for it in the water." If you say, "f. a. s. water mill wharf," that you put after

(Testimony of W. Leslie Comyn.)

your "f. a. s." If you put "vessel," "ship," or "steamer," or anything you want to, after it, it is free alongside ship. You won't find a contract without something following f. a. s. When the contract is "f. a. s. vessel" it means that the delivery is to be made on the mill wharf, on the face of the mill wharf, so that the vessel can get it. It is customary to receive delivery on the mill wharf at the ship's tackle when the vessel is named and is at the mill. When they reserve the [115—51] right to make delivery on both sides of the vessels, from barges and from the mill wharf, the mill is not delivering to that ship. They are bringing it from some other mill. I have never had a mill reserve the right to make delivery to the ship from both sides of the vessel, from the mill wharf, and from barges in the water. The lumber is always delivered on the mill wharf, but if it came from a man who had more than one mill, I would say yes it might be done. I have known of mills reserving that right. I have known the selling agent for a number of mills to do that. That does not always mean that the seller of the lumber reserves to himself two methods of making delivery to the ship. When the seller of the lumber reserves the privilege of making delivery from both sides of the ship, one delivery from the mill wharf and one delivery from barges on the other side of the vessel, it means he could deliver them any way he wanted to. He could deliver by barges under those conditions if he wanted to, if that was in the contract. If it is in

(Testimony of W. Leslie Comyn.)

the contract, it reserves to the seller the right of making deliveries from either side from other mills. It means that it comes from another mill. He would not load that off his dock on to a lighter and bring it around to the other side of the ship, because he would simply be throwing away money; he would bring it from some other mill on a lighter. He has that privilege. If he reserves it, that would give it to him. It would give him the right to make a double delivery. There would be no objection whatever, provided the ship could handle it. The term "a. s. t." is a new one in the trade. As I understand it, they have had it in only since the Douglas Fir was put in. That is what they call "at ship's tackle," which is an unknown term in the trade. The clause "This price is for delivery f. o. b. mill wharf, Knappton, within reach of vessel's tackles, and/or on barges a. s. t. mill wharf" refers to the price. It most assuredly does. It says price. It is only a matter of price. It means that the [116—52] price is for delivery on mill wharf or on a barge, if they want to bring it by barges. It is to cover the cost of their barges. If they bring it along in barges they have to pay the cost of the barges.

Mr. McCLANAHAN.—Q. What I am getting at is this, the option which is given to the seller.

A. Provided they do not charge any more.

WITNESS.—(Continuing.) This is the option given to the seller, provided they make no additional charge. This is the option we have been

(Testimony of W. Leslie Comyn.)

talking about, which under the contract is given to the seller, but it provides it at the same price. I just want to make the point that it is the price. When this contract of November 2, 1916, was entered into, it was intended to be in place of and as a substitute for our purchase from the Charles Nelson Company. We released the Charles Nelson Company from the obligation and entered into this obligation with the Douglas Fir. The Charles Nelson Company contract has nothing to do with this except to show what was intended and what was not written into the second contract. The price of Douglas Fir set by the Douglas Fir Exploitation & Export Company at the time of the contract with us of November 2d was \$9.50. That is the price at which they put it in. I do not know that the market price paid was very much in excess of that. The market price set to others was \$10. They raised the price right afterwards. To the best of my knowledge and belief, it was only \$10. They might have raised it to \$10.50. It was either \$10 or \$10.50. They raised the price immediately afterwards, but in order to get us to take this contract over they lowered the price to \$9.50. When this contract of November 2d was entered into, it was our intention to load on the "Marston" and the "Talbot," two of the named vessels, the lumber purchased under the contract, provided they came along in time. It was also our intention to name later on two vessels [117—53] to carry the balance of the purchase. I believe that later on we named the

(Testimony of W. Leslie Comyn.)

“Golden Shore” and the “William Bowden.” I don’t remember when we named the “William Bowden.” I could not tell you the exact date when we found that the “W. H. Marston” would be unable to make her loading date. I named it this morning, with a letter probably in front of me.

Mr. McCLANAHAN.—You have not any recollection independently of the time when you found you could make the loading date?

A. I think it was some time in February, Mr. Baxter started this business of refusing to load the ship.

WITNESS.—(Continuing.) The date of her arrival in Melbourne was October 4th. It was quite apparent on the face of it, before October 4th, that she could not make her loading date. She had taken 96 days to go down. It was apparent in October. It was apparent in September. I do not know whether it was apparent earlier than that or not. Probably it was not given any attention until Mr. Baxter raised the question. The letter which you show me refreshes my memory with regard to the naming of the “Golden Shore.” One of my office staff wrote that letter. It was evidently done on the 28th of February, 1917.

Thereupon Defendant’s Exhibit “A” was admitted in evidence, and was in words and figures as follows:

(Testimony of W. Leslie Comyn.)

Defendant's Exhibit "A."

"San Francisco, February 28, 1917.

Douglas Fir Exploitation & Export Co.,
City.

Gentlemen:

Your Ref: B-572 Order #41.

Our Order #039.

We note from your favor of the 26th inst. that the above order, calling for 725 M feet, 15% more or less, will be supplied by the National Lumber & Manufacturing Co., Hoquiam, Wash., instead of by the Kleeb Lumber Co., and enclosed we are returning you an acceptance of the order.

This contract will be lifted by the schr. 'Golden Shore,' now on passage to Port Pirie and already due there." [118—54]

WITNESS.—(Continuing.) I could not say whether we obtained the information as to the position of the "Golden Shore" from the "Guide," or not. I would not do that. The manager of my South American Department would do it. My West Coast Manager could have obtained that information from the "Guide." If the "Guide" was still published and had not been stopped by the United States Government, anyone could obtain the information. The letter which you hand me with reference to the "Golden Shore," dated May 4, 1917, was written by our West Coast Department. It has every appearance of being the *pro forma* bill of lading for the "Golden Shore" referred to in the letter.

(Testimony of W. Leslie Comyn.)

Thereupon said letter was admitted in evidence and marked Defendant's Exhibit "B."

WITNESS.—(Continuing.) The paper which you hand me contains the signature of my concern at the bottom of the page. It is probably the specifications of the "Golden Shore." The specifications are dated May 23, 1917, and consist of three pages, the last of which is signed by Comyn, Mackall & Co., West Coast Department, H. A. Wilson.

Thereupon the said paper was admitted in evidence and marked Defendant's Exhibit "C."

WITNESS.—(Continuing.) I do not remember, with reference to the "Golden Shore," that there was a change in the November 2d contract, so as to bring the "Golden Shore" within an earlier loading period. Defendant's Exhibit "C," which purports to be the specifications, is on the form of the Douglas Fir Exploitation & Export Company. We undoubtedly furnished the specifications to them. So far as I [119—55] know, this is the copy of the specifications furnished by us. With reference to the "Talbot," we furnished specifications. I think you will admit the specifications were furnished for the "Talbot." We had to furnish specifications, or she would not have been loaded. To the best of my knowledge, the letter you show me is the one accompanying the specifications and those are the specifications.

Thereupon letter dated July 23, 1917, addressed to the Douglas Fir Exploitation & Export Company by the plaintiff, and enclosing said specifica-

(Testimony of W. Leslie Comyn.)

tions, was admitted in evidence and marked Defendant's Exhibit "D."

WITNESS.—(Continuing.) The specifications furnished for the "W. H. Talbot" called for 930,000 feet of lumber, while the contract contained the number 1,000,000. The explanation which I make of that is that the specification was made by the buyer in Australia, and not by us. Those specifications which appear on the letterhead of the Douglas Fir Company were furnished by the Douglas Fir Company to us. They were furnished by the buyer in Australia to us.

Mr. McCLANAHAN.—I would like to read, if your Honor please, one provision of the specifications just offered in evidence, as I want to base a question to the witness on it:

"This vessel should carry about 1000 M feet, and you are to load last, under no mark, 6x12, 10 to 40 feet merchantable to complete her cargo."

Q. I will ask you, Mr. Comyn, if that statement which I have just read does not appear on the specifications furnished to the seller by you?

WITNESS.—(Continuing.) The statement which you have just read appears on the specifications furnished to the seller by us. It is not our statement. It is the buyer's statement in Australia. We [120—56] represented the buyer, however. Our position in this case is that we purchased one parcel of lumber, and not four cargoes. We made no distinction between any of the vessels. The object of putting into the contract the name of any

(Testimony of W. Leslie Comyn.)

vessel was because Mr. Baxter put it in. We did not. The object of our consenting to its being put in was that it came written in that way, and my Australian Department passed it as it came in. I mean to say absolutely that Mr. Baxter originated the idea. I mean to say absolutely that the idea of 1,300,000 feet being for the "W. H. Marston" was originated by him from the Charles Nelson Company's letter, which you have before you and which is in evidence. Mr. Baxter also originated the provision that a million feet were for the "Talbot." It is in the Charles Nelson letter. We might have had a charter-party for these vessels at that time, and we might not. We did have a charter-party on the "Marston." Whether we had one on the "Talbot" or not I do not know. Subsequently I got a charter-party for the "Talbot," if it was not already chartered. But we stated in the letter that we probably would move the lumber by those two ships, in the letter to Charles Nelson. When Mr. Baxter wrote this letter, the name of the vessels was merely an incident. It coincided with my views then. It was merely an incident. When this letter was signed, initiating the contract, I was intending to use the "W. H. Marston" for a part of the purchase. We said that we would probably use that vessel, in our letter to the Charles Nelson Company. It also appears in the evidence that we did intend to use the "Talbot." We also intended to use the "Golden Shore" when we named her. We also intended to use the "William Bowden" when we

(Testimony of W. Leslie Comyn.)

named her. When the contract was made we intended to name two other vessels to carry the cargo. The object of putting into the contract "15 per cent more or less" was the custom. It is customary to put in 15 per cent more or less when you buy any quantity of lumber. When you [121—57] buy lumber, if you are buying 3,000,000 feet or 10,000,000 feet, you put in "15 per cent more or less." The idea is that we can take more or less, as we want. When we buy 10,000,000 feet of lumber, 15 per cent more or less gives us a great big leeway. It is customary to buy lots of lumber, definite blocks of lumber, and retain the option or privilege of taking delivery of 15 per cent more or less at the given price. That is customary, and that is what we always aim to do, because if the cargo goes down we do not have to take the 15 per cent, and if it goes up, we get the benefit of the 15 per cent. This is so irrespective of whether it is intended for a given vessel or not. That is one of the ways we sometimes make more money. It gives you a speculative contract with a leeway of 30 per cent. The object of putting into our contract "to suit the capacity of the vessel" is just what it states—to suit the capacity of the vessel. Practically it works out that the vessel is completely loaded. When it is completely loaded the contract is fulfilled. If the contract is for that particular vessel, it is fulfilled. Fifteen per cent more or less does not apply if the vessel is at the mill. If it is a contract for a particular vessel, the contract is fulfilled when the vessel is loaded, if the

(Testimony of W. Leslie Comyn.)

contract is to suit her capacity, irrespective of whether it is a given number of feet in the contract, if it is a contract for a cargo by the vessel. In this particular matter it was not the intention originally that this should be a cargo for the "W. H. Marston." I did not say just a little while ago that it was. The original intention was that we bought 3,500,000 feet, 15 per cent more or less.

Mr. McCLANAHAN.—Q. I mean when you signed this contract on November 2d, that was your intention then, to load that on the "W. H. Marston," to suit her capacity?

A. It was put in there by Mr. Baxter.

WITNESS.—(Continuing.) It was signed by my office. I have [122—58] said that the naming of the vessel in this contract was simply an incident. It is not an incident that the contract contains the provision for demurrage according to charter-party. It is absolutely an incident that the contract names the destination of the vessel, so far as the mill is concerned. The mill is not interested in that. It is an incident of that contract that the loading port is to be named in ample time to give the vessel instructions before leaving her next previous port of call. They have 90 or 100 days to do it in. That is an incident.

Mr. McCLANAHAN.—Q. Is it an incident that the conditions and terms of "G" list apply?

A. They do not always apply.

WITNESS.—(Continuing.) I do not think that they were ever considered outside of the price. I see

(Testimony of W. Leslie Comyn.)

in Plaintiffs' Exhibit No. 4, terms and conditions as per "G" list. That is not an incident. The terms are not. That is an important matter, as far as the price is concerned.

Mr. McCLANAHAN.—Q. Are the terms and conditions of "G" list for the benefit of both buyer and seller?

Mr. SUTRO.—I object to that as calling for a construction of the contract.

The COURT.—I think you are asking him for a construction of the contract, a question of law.

EXCEPTION No. 4.

WITNESS.—(Continuing.) It is certainly an advantage to the loading mill to know with measurable definiteness the time when they would be called upon to cut a cargo of lumber. The naming of an exporting vessel gives to the loading mill some measure of information on that subject. They can see where she is and follow her [123—59] movements. They can get information from the "Guide" or some such paper or from the buyer. We have sold f. a. s. cargoes as a manufacturer. We have found that when we extend our delivery dates over a period of, say, 90 days, it is helpful to us, as a manufacturer, to know by examining the "Guide" and such papers when the carrying vessel will probably require the lumber, because you will then be guided as to when you shall begin to cut your lumber. It is a matter that the mill likes to know. They might slip in another cargo in the meantime. We have done that before. When we

(Testimony of W. Leslie Comyn.)

found a vessel was going to be late, we have taken one out of order and put it in. It enables your mill to keep circulating right.

Mr. McCLANAHAN.—Q. When you were in the manufacturing business, was it not a custom known to the trade that the delivery of a cargo to a named vessel took place as soon as the cargo got into the slings or tackles of the exporting vessel?

A. They take it from the mill wharf.

Q. And as soon as they got it into their slings, then it belonged to the vessel?

A. It was at the buyer's risk after it left the mill wharf.

WITNESS.—(Continuing.) The custom is, when we charter a ship, the price you pay includes their getting stevedores and their loading the ship with the cargo. The mill company does not get the stevedores. The man who charters the ship does that. They buyer's price of the charter covers the cost of loading the cargo from the mill wharf on to the ship. The ship takes from the mill wharf, but the mill people pile it out on to the wharf. The stevedores are the servants of the buyer. The ship is the servant of the buyer. When I spoke of the buyer's price for the cost of taking the lumber off the wharf, I meant the buyer's price of the ship under the charter, not to the mill. The mill brings the lumber out so that the ship can get at it. In the sale of this particular cargo for the "W. H. [124—60] Marston" we furnished the specifications. The contract called for that, and we fur-

(Testimony of W. Leslie Comyn.)

nished them. To the best of my knowledge and belief, the letter of ours which you show me, dated September 19, 1917, which has already been introduced in evidence refers to the bills of lading and specifications for this cargo.

Thereupon the contents of said letter, consisting of the *pro forma* bills of lading and specifications so identified, were admitted in evidence and marked Defendant's Exhibit "E," and were in words and figures as follows:

Defendants' Exhibit "E."

"Enclosed we beg to hand you specifications for this vessel, which we trust you will find in order.

You will note that the vessel is to be despatched to Melbourne, and we will require the following documents:

BILLS OF LADING—Two originals and three non-negotiable copies covering each mark as per *pro forma* herewith."

WITNESS.—(Continuing.) At the time that that letter was written I had not of my own knowledge found that the "Marston" would not be able to make her loading date. I did not know as to that, because I was not dealing with it. My Australian Department was dealing with that. The fact that my Australian Department wrote that letter would indicate that the question had not come up between them and Mr. Baxter. It was then that Mr. Baxter for the first time in his experience, or in my dealings with him in twenty years, raised

(Testimony of W. Leslie Comyn.)

the question about the inability of the "W. H. Marston" to make December loading. This suit was the result of that. We decided to take this lumber on barges immediately after he refused to deliver it to the ship. He most assuredly refused to deliver it to the "Marston." He did so when he said that she could not arrive in time. I do not mean that he refused to extend her loading date. I mean that he said he would not deliver that lumber to the "Marston" if she arrived there after December 31st, and when he said it he [125—61] knew she could not arrive there by December 31st. He refused verbally to deliver the lumber to the "Marston."

Mr. McCLANAHAN.—Q. Mr. Comyn, you said this morning that Mr. Baxter had refused, or that he did at that time refuse, to deliver lumber to the "Marston." You meant by that that he refused to deliver it except the "Marston" came within the loading date?

Mr. SUTRO.—That is our contention.

Mr. McCLANAHAN.—Q. Is that what you meant?

A. That is very obvious.

WITNESS.—(Continuing.) That is what I meant. We had a purchaser for the lumber at that time. The cargo was sold. I could not give you the exact date, but I could look it up and advise you. It was sold to our buyers, Rosenfeldt & Co. When we sent the defendant the contract of November 2d we wrote them this letter on November 6.

(Testimony of W. Leslie Comyn.)

My Australian Department wrote that. It is signed by Claude Daly. Mr. Daly was one of my men at that time. His position was Manager of our Australian Department. He was a man in authority. The paper which you show me is apparently a copy of a letter from the Douglas Fir.

Thereupon Defendant's Exhibit "F" was admitted in evidence and was in words and figures as follows:

Defendant's Exhibit "F."

"November Sixth, 1916.

Douglas Fir Exploitation & Export Co.,
260 California Street,
San Francisco, California.

Dear Sirs:

We have to acknowledge receipt of your sale note covering 3500 M' 15% more or less October to December, 1917. We now take pleasure in approving same as per enclosed. It is understood that the vessels named in your sale note are not to load above the bridges on the Columbia River, and with regard to the balance of the purchase, it is understood that the same cannot, under any circumstances, be shipped from the Portland Lumber Company. We have also very great prejudice against shipping from the Inman Poulsen, Clark & Wilson and Peninsula Mills, and would much appreciate your not [126—62] stemming us with those mills. We presume also that you would have no objection if it was found convenient, to our sub-

(Testimony of W. Leslie Comyn.)

stituting other vessels in place of the 'Marston' or the 'Talbot.'

Very truly yours,
COMYN, MACKALL & CO.,
Per CLAUDE DALY."

WITNESS.—(Continuing.) That refers to the contract of November 2d.

Thereupon Defendant's Exhibit "G" was admitted in evidence, and was in words and figures as follows:

Defendant's Exhibit "G."

"November 8, 1916.

Messrs. Comyn, Mackall & Co.,
310 California St.,
San Francisco, California.

Gentlemen:—

We acknowledge yours of the 6th and confirm your understanding than none of these vessels will be required to load above the bridges at Portland which, in itself, would exclude the Portland Lumber Company; but we will also agree that none of them are to load at the mill at Portland.

The other mills mentioned by you—Inman Poulsen, Clark & Wilson and Peninsula Lumber Company—are not interested in our company, but if they should later come into the company, Inman Poulsen would still be excluded on account of being above the bridges. This then would leave only Clark & Wilson and the Peninsula Mills as possibilities and we would prefer to keep them in that

(Testimony of W. Leslie Comyn.)

position, as it might be very necessary for us to load one of your vessels at one of these mills.

As regards substituting other vessels for 'Marston' and the 'Talbot': As these vessels are now matters of record in the contract, we would prefer not to have any agreement giving you the option of naming other vessels. If, however, you have now or will have at any future time other vessels in like position and for your convenience wish to substitute them for either one or both of these vessels, we will be pleased to go into the matter with you with a view of meeting your necessities.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By _____,
General Manager."

WITNESS.—(Continuing.) I think it is very likely that after the receipt of the letter of November 8th we had vessels in like position to the "W. H. Marston." We had some 50 or 60 vessels under charter. What was the use of our taking up with Mr. Baxter the question of substituting another vessel in like position? I cannot say that we ever did, whether our Australian Department did it or not, but I should say that they did and were turned down. [127—63]

Mr. McCLANAHAN.—Q. Answer the question: You had accepted the contract of November 2d when on December 15th Mr. Baxter sent you the acknowledgment of contract?

(Testimony of W. Leslie Comyn.)

A. The acknowledgments were accepted.

WITNESS.—(Continuing.) The acknowledgments were accepted. They were all final contracts. The acknowledgment dated December 15th was not made by us with full knowledge that we could not substitute another vessel as the receiving medium for this lumber. We always substituted other vessels prior to that time. I do not think it ever occurred to me when I signed the contract dated December 15th, that we could not in this case substitute a vessel for the “W. H. Marston.” I had not forgotten about the letter of November 8th. That had never occurred to me before. We always substitute vessels. I had not forgotten Mr. Baxter had refused to substitute in this case. I did not know that letter had been written, personally.

Mr. SUTRO.—Q. Mr. McClanahan, yesterday you asked for the specifications; here they are.

Mr. McCLANAHAN.—Yes. And I asked for the invoice of the “Marston” cargo, also for the specifications and also for the date of loading.

Mr. SUTRO.—I think you will find it all right here. The date of loading is shown on the invoice. It was, I think, May 17, 1918. That is close enough anyhow, the middle of May.

WITNESS.—(Continuing.) The *pro forma* bills of lading furnished by us to the defendant were left blank as to the number of specification pieces, because you cannot tell how many pieces are going into the cargo until the cargo is cut. You can tell approximately the number of specification pieces

(Testimony of W. Leslie Comyn.)

intended for the cargo of a named vessel before the cargo is actually loaded. We did not approximate the number of the *pro forma* bills of lading, because they would be different sizes. There would be different sizes and [128—64] number of pieces. We did not approximate it, because a mill cuts different sizes. They measure up every day, and they can tell approximately when they have 1,300,000 feet, how many pieces they have. The bill of lading is a matter with which the mill has nothing to do, except as an accommodation to the buyer. It is no part of their contract.

Mr. McCLANAHAN.—Q. Here you have furnished to the seller a specification with the different kinds of lumber that the order is for, but you have left blank the number of pieces, while at the same [129—64a] time you have sent in a specification that gives the number of pieces; now, I ask you why it was that in the specification you named the number of pieces, and in the *pro forma* bill of lading you left the number of pieces blank? Isn't it because you could not know until the vessel was actually loaded with this specification lumber, how many of the different pieces would have to be inserted in the bill of lading?

A. Exactly, but the mill does not have to do that; our agent can insert that in the bill of lading. We don't have to send that bill of lading to the mill.

Q. And that is the reason, is it not, you could not tell until the vessel is actually loaded how many

(Testimony of W. Leslie Comyn.)

pieces of specification lumber would appear in the bill of lading?

A. No, not until the vessel is loaded.

WITNESS.—(Continuing.) We ordered sufficient barges to take 1,300,000 feet. I have no personal knowledge that only one barge was sent there. I know we were prepared to send barges to take 1,300,000 feet if we could get the lumber.

Mr. McCLANAHAN.—Q. I grant that. I simply wanted to correct what I thought was an error in your statement when you said that barges were at the mill dock to receive this lumber, when there was but one barge; you know that, don't you?

A. All I know is that arrangements were made for sufficient barges to take 1,300,000 feet of lumber from that mill.

WITNESS.—(Continuing.) I do not know of my own knowledge that only one barge went there. I do not know how many were sent. I know that we made arrangements to send enough to take that lumber. It might have been one, or it might have been three. At the time that this one barge or a number of barges were arranged for, we did not know that the Douglas Fir had declined to deliver to barges. We did not know that they would decline to deliver to barges. There [130—65] was no telling that they would decline when we sent the barges to the mill. We certainly expected to get that lumber.

Mr. McCLANAHAN.—Q. Now, I ask you if you did not know, when you went to the expense of send-

(Testimony of W. Leslie Comyn.)

ing this barge there, that the defendant had already denied you the right of taking delivery on a barge?

A. There was every reason to believe they would change their minds.

WITNESS.—(Continuing.) Yes, we had such a letter in our possession. We took the chance of their changing their minds, and we sent the barges. That expenditure represents \$304. I remember my testimony to the effect that the difference between the contract price of the lumber and the purchase price from Dant & Russell was \$17,511 on a sale of 1,300,000 feet. I did not do this figuring. It was done with a pencil and paper by Mr. J. Claude Daly, the gentleman whose name appears on the contracts in suit here. He figured out the cost of our order to the Douglas Fir at \$9.50 "G" base, by figuring the average price of the specification. Undoubtedly he took the specification. Undoubtedly he would have to do that, and I should say that he undoubtedly applied to the several lengths, breadths and sizes of the specifications the appropriate price based on the "G" base price of \$9.50. Those different pieces and lengths, breadths and sizes of specification lumber bore different prices. The \$9.50 was figured as the base price per thousand for the 1300 M feet.

Mr. McCLANAHAN.—Q. But that was not the price that was figured as the cost of that invoice? You did not multiply 1300 M by \$9.50?

A. The specifications are the same in either event; it doesn't make any difference whether you

(Testimony of W. Leslie Comyn.)

take \$22.50 base or a \$9.50 base, the extras are the same.

WITNESS.—(Continuing.) The \$9.50 base price was the base price only. There were practically no deductions from that. They were [131—66] all additions. We bought the cargo from Dant & Russell shortly after this figuring was done. The contract states the date, I think. It might have been December 7, 1917, or a day or two before that that we bought the lumber, and then the contract was sent up. At that time, on December 7, 1917, we did not know in the lengths, breadths and sizes the number of specification pieces of lumber that could be loaded on the "W. H. Marston." You take the specifications, 1,300,000 feet. My answer is no, not exactly.

The COURT.—I suppose this figuring or estimate or whatever it is was based on the specifications that had been furnished to the defendant by the plaintiff along in September or October or whatever it was.

Mr. McCLANAHAN.—Yes, your Honor.

Mr. McCLANAHAN.—Q. So that this figuring that was done by Mr. Daly, by which you ascertained the difference between the price of \$9.50 and \$22.50, was figured without any reference to the capacity of the "W. H. Marston"?

A. It may not have been figured until after the "Marston" was loaded with that cargo; that I cannot say; it might have been figured before; it might have been figured after.

(Testimony of W. Leslie Comyn.)

WITNESS.—(Continuing.) If it was figured before, it was figured without knowing exactly what she would carry. If it was figured afterwards it was figured exactly on what she did carry. I do not know, as a matter of fact, whether it was figured before the “Marston” was loaded. I do not know that this case was filed December 27, 1917. If that is the case, then it was figured before.

Mr. McCLANAHAN.—Q. And without any reference to the actual carrying capacity of the “Marston”?

A. The “Marston” was not finished loading until May.

Q. And this figuring was done without any reference to the actual carrying capacity of the “Marston”? [132—67]

A. It was figured on the specifications we received.

WITNESS.—(Continuing.) It was simply figured on the specifications, which figured up 1300 M feet.

Mr. McCLANAHAN.—Q. If the “Marston” had been loaded within the contract date, if she had arrived here and had been loaded within the contract date, before the 31st of December, the invoice which would have been made and rendered for that cargo would have been based on what was loaded on the “Marston,” would it not?

A. On the barges.

(Testimony of W. Leslie Comyn.)

WITNESS.—(Continuing.) Assuming that the “Marston” arrived and that she got in here in December and went to the mill to load, it is absolutely true that after she had loaded, the invoice would have been based on what she carried. That is the way the “Marston” was handled when she was loaded at the Dant & Russell mill. We paid for what she carried. That was the way the cargo that the “Talbot” carried was figured. I know that it was more than 1300 M feet. It was 1314 M feet; it was 14,000 more than 1300 M. I saw the figures this morning on that invoice. I have chartered a great many vessels. When I charter a vessel, one of the necessary items that I must know is approximately how much she will carry. When I chartered the “W. H. Marston” from J. J. Moore & Co., I knew approximately what she would carry. We have the approximate carrying capacity of every vessel owned on the Pacific Coast. When we put into this contract 1300 M feet, that was what we had approximated to be her carrying capacity. This 15 per cent more or less was a leeway to be used in the loading of the ship.

Mr. McCLANAHAN.—Q. Now, Mr. Comyn, if our construction of this contract is correct, namely, that this was a purchase of a cargo for the “W. H. Marston,” will you not admit that it would be impossible to load that cargo for the “W. H. Marston” on to barges if the cargo was to suit the capacity of the “W. H. Marston”? [133—68]

A. If 1300 M had been put on barges, the “Mars-

(Testimony of W. Leslie Comyn.)

ton" would have gone to sea with the 1300 M and it would have constituted a full and complete cargo for the "Marston."

WITNESS.—(Continuing.) We are the judge of what constitutes a full and complete cargo for our ships. A cargo for a ship is such a cargo as a charterer chooses to put on. It is not necessarily [134—68a] a full shipload. The charterer has the right under the charter-party to pay dead freight. If a charterer chose to send the "Marston" out 14,000 feet shy we could have paid the dead freight, and it would have been a full and complete cargo for the "Marston." If we wanted to put on a full cargo on the "Marston," a cargo to suit her capacity, I consider that we could load that on barges in the specification lengths, breadths and sizes. We knew sufficiently close to the actual capacity of the "Marston" to put the cargo on barges to give that ship a full cargo, running the slight risk of paying possible dead freight, but with very little chance of dead freight, because our estimate is so close. It was within 14,000 feet. It turned out to be close. We paid for the "Talbot" cargo the amount of lumber that she actually carried. The reason why the "William Bowden," our fourth ship, was not loaded, was because we could not get barges to put to the mill. If we could have got barges, we would have put barges alongside the mill and had that lumber. The "Bowden" had not arrived here between October and December. We could not get the cargo. We could not get barges to the side of

(Testimony of W. Leslie Comyn.)

the mill to take the lumber. If we could, we would have got the barges, and that case would have been here, too. The "G" list prices are not necessarily based upon delivery to sailing vessels. The "G" list itself says so, but it never has been the custom in the trade. You could deliver to anything you want on all sales made on the "G" list at that time. If the seller in this contract is given the right to make delivery of the cargo on barges at the ship's tackle mill wharf, that does not necessarily require the actual presence there of the vessel. He could exercise his right to deliver on barges at the ship's tackle mill wharf, without the vessel being there, by putting it on barges. He could take it from his barge and put it on ours. That would be absolutely a delivery at ship's tackle. Our stevedores would take it off their barge, [135—69] and put it on our barge. That would be a delivery at ship's tackle. It would be ship's side, ship's tackle. With regard to this offer that I say was made to the defendant of \$2,500, if it would extend the loading date of the "W. H. Marston," J. J. Moore & Co. applied to us, to the best of my recollection and belief, to be allowed to bring a cargo of wheat up in that ship, and we told them to take up their negotiation with Mr. Baxter, as we could not negotiate with them. The man that I talked to was, I believe, Mr. Blair, the manager of J. J. Moore & Co. I only know that he made them an offer with our consent. I simply heard through my Australian Department that the negotiation was

(Testimony of W. Leslie Comyn.)

going on; that Mr. Blair had made the Douglas Fir an offer, I do not know whether it was \$2,500 or not.

Mr. McCLANAHAN.—Q. Yesterday you said \$2,500.

A. There was something in the correspondence which showed that \$2,500 had been offered. No, you made the statement that we had offered \$2,500. We didn't offer \$2,500. You made that statement.

WITNESS.—(Continuing.) It is my understanding that J. J. Moore & Co. offered the defendant \$2,500 if they would extend the "Marston" loading date. My understanding is that the offer was made by J. B. Blair of J. J. Moore & Co. to Mr. A. A. Baxter of the defendant company, and that my concern had nothing to do with that offer; and I got that understanding from Mr. Daly. It did not make any difference to us whether the "W. H. Marston" returned from Melbourne to this Coast in ballast, or whether she carried a cargo, although we got \$5,000 for that privilege. It made no difference to us after you had refused to give us the lumber. At that time the lumber was going to be loaded on the "Marston" when she came along, as it has been customary for vessels to be loaded. I doubt whether the carrying of the cargo delayed the "Marston." There was a consideration for the payment of the \$5,000, for she carried a cargo of wheat instead of coming up in ballast.

[136—70]

(Testimony of W. Leslie Comyn.)

At the time we purchased this cargo from the defendant we did not have a buyer for it.

Mr. McCLANAHAN.—Q. When did you secure a buyer for this cargo?

Mr. SUTRO.—I object to that as utterly immaterial. It is merely to save time and to put some limit on this cross-examination that I am objecting. He bought this lumber and didn't get it. The question is whether there was a breach of contract, and whether they are liable for the damages. What difference does it make whether he sold it or whether he put it in the ocean, or what he did with it. I object to this as immaterial.

The COURT.—My judgment is that under the pleadings in this case the objection is well taken. The question is simply whether this contract has been breached, and if so, the measure of damages would be the difference between the contract price and the market value at the time of the breach. It is not a matter of any concern what the plaintiff did or intended to do with the lumber.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 5.

Mr. McCLANAHAN.—May I ask one or two preliminary questions, your Honor, in order to save my exception?

The COURT.—All right.

Mr. McCLANAHAN.—Q. Was the contract with your buyers in Australia not made before October, 1917?

(Testimony of W. Leslie Comyn.)

Mr. SUTRO.—The same objection.

The COURT.—The same ruling.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 6.

Mr. McCLANAHAN.—We save an exception.
[137—71]

Q. Was this lumber that was loaded on to the “Marston” by Dant & Russell not used in the fulfillment of the contract which had been made prior to October, 1917?

Mr. SUTRO.—The same objection.

The COURT.—The same ruling.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 7.

Mr. McCLANAHAN.—Exception.

Q. Did you not suffer no loss in the fulfillment of that contract by the lumber loaded on to the “Marston” by Dant & Russell?

Mr. SUTRO.—The same objection.

The COURT.—The same ruling.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 8.

Redirect Examination.

It is a matter of value to the mill to know the whereabouts of a vessel that is named in the contract, under circumstances where they are going to load the vessel, whether she arrives within the con-

(Testimony of W. Leslie Comyn.)

tract period or a little after. If the time for the delivery of the lumber is specified, and the seller takes the position that delivery must be made within that time, then the seller does not need to know it. They know when they have to get the cargo ready.

MR. SUTRO.—I would like to offer that letter in evidence. It is dated August 17, 1917. It relates to the “Bowden.”

Q. That was one of the named vessels, one that was subsequently named? A. It was.

Q. For one of those four cargoes? [138—72]

A. Yes, for one of those four cargoes.

Thereupon Plaintiffs' Exhibit No. 24 was admitted in evidence and was in words and figures as follows:

Plaintiffs' Exhibit No. 24.

“San Francisco, August 17, 1917.

Messrs. Comyn, Mackall & Co.,

310 California Street,

San Francisco.

Gentlemen:

‘WILLIAM BOWDEN.’

We acknowledge your favor of the 16th inst., with specification [139—72-a] for this cargo, and accept the vessel conditioned on her making the loading date provided in the contract, and with the further understanding that as the original contract, dated November 2, 1916, provides for two vessels to be named with a joint capacity of 1450 M, which is interpreted to mean, as usual, 1450 M, 15 per cent more or less, and as you have already named the

(Testimony of W. Leslie Comyn.)

‘Golden Shore’ for one cargo and now name the ‘Bowden’ for a second cargo, which vessels combined will probably carry more than the maximum amount of the contract, that you will pay us for all such excess carried by these two vessels over and above the 1450 M plus 15 per cent, at the present market price, namely, \$20 base ‘G’ list, less 2½% and 2½% for cash.

Please send us the charter-party, in duplicate, for the ‘William Bowden.’

Written in duplicate—please approve and return one copy for our files.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EX-
PORT CO.

By A. A. BAXTER,
General Manager.

AAB-L.

Approved:”

WITNESS.—(Continuing.) As I understand it, that letter was approved. I could not say offhand whether we loaded the “Golden Shore.” I would have to see the document. I could tell you if I saw the document. We did not load the “Bowden.” I think we loaded the “Golden Shore.” She did not carry more than 1450 M feet and 15 per cent more. She carried 725 M feet, 15% more or less. She did not carry in excess of 725 M plus 15 per cent. It is a fact that the specifications cover the obligation of the mill in respect to the lumber to be de-

(Testimony of W. Leslie Comyn.)

livered. I stated that the "Marston" was loaded within approximately 14,000 feet of 1,300,000. That would be approximately one per cent. In figuring the price you take your invoice, say, for instance, of the "Marston," 1314 M feet base. With regard to your first $2\frac{1}{2}$ per cent, you have to make up your invoice before you deal with it. Assuming that the base is \$9.50 you have to add your extras first, and then deduct your first $2\frac{1}{2}$ per cent from that amount for that invoice, and then deduct your second $2\frac{1}{2}$ per cent.

Mr. SUTRO.—Q. Now, Mr. Comyn, if you will assume, just to oblige me for a moment, that the price was \$9.50 on 1,300,000, that would give you \$12,350; now, just assume for a moment that that was [140—73] the actual price, you would deduct $2\frac{1}{2}$ per cent of that, wouldn't you? A. Yes.

WITNESS.—(Continuing.) That would be \$308.15, which would leave you \$12,041. Then you deduct $2\frac{1}{2}$ per cent from that, and that gives you \$301, or a difference of \$11,740. Assuming that you figured 1,300,000 feet at \$22.50, that would give you a figure of \$29,250. In estimating your damages, the difference between the two would be, if those were the correct figures, \$17,511, the amount we are suing for. One is a net rate, though. That is the amount we are suing for here.

Recross-examination.

To the best of my knowledge and belief, that is the way the bill was figured.

(Testimony of W. Leslie Comyn.)

Mr. McCLANAHAN.—Q. Don't you recognize, Mr. Comyn, that that is directly opposite to what you testified on cross-examination? You said on cross-examination, in substance, that the base "G" list price was \$9.50, and that that was used as a base price to which was added an additional price to suit the different sizes of the lumber: Isn't that true?

A. He just read the invoice.

WITNESS.—(Continuing.) Mr. Sutro was absolutely correct when he multiplied 1314 M by \$9.50. Then you add the difference that goes to the different sizes and lengths and breadths of the lumber.

The COURT.—It would probably make the damages larger, wouldn't it?

Mr. McCLANAHAN.—It would make them very much larger.

The COURT.—I think I understand the situation. But your theory would make the plaintiff's damages much larger?

Mr. McCLANAHAN.—Yes.

Mr. SUTRO.—Yes, much larger. We took the minimum damages. I want to ask the witness one more question.

Q. You were asked by Mr. McClanahan why you did not avail yourself [141—74] of the offer that Mr. Baxter made in this letter, that in case you wanted to substitute another vessel he would take up the matter to suit—what did he say, what was his language? Let me get the letter. Mr. Baxter said that he would be pleased to go into the matter with a view to meeting your necessities in case you found

(Testimony of W. Leslie Comyn.)

it necessary or desired to substitute another vessel. That letter was written November 8, 1916. Now, in September, 1917, when you discovered that the "Marston" could not make her loading date, why did you not ask Mr. Baxter to substitute some other vessel?

A. Because Mr. Baxter, when we leased the Dominion Mill in June, of 1916—

Q. Was it 1916?

A. In June of 1917, he stated that he would do no more business with us, and would endeavor to put us out of business.

Q. Did Mr. Baxter offer to substitute any other vessel for you? A. He did not.

Q. Did Mr. Baxter, in 1917, so far as you know, ever offer to meet your necessities with reference to the "Marston"? A. Just the reverse.

Q. He refused to deliver unless you purchased on his terms? A. He refused to sell us.

At this point plaintiffs rested their case in chief.

Mr. McCLANAHAN.—Now, if your Honor please, at this time I will make a motion for a nonsuit. I understand the Court will not pass on it now.

The COURT.—No, I will not pass on it now.

Mr. McCLANAHAN.—We move for a nonsuit on the following grounds:

First: The record shows and the proof is, that it would be impossible to make delivery of a cargo of Douglas Fir, in accordance with the requisite specification lengths, breadths and sizes, to [142—75]

suit the capacity of the schooner "W. H. Marston," where such delivery is to be made to barges, or any other receiving medium (other than the vessel herself), unless such capacity was known, and that such capacity was not known.

Second: The record shows and the proof is that it would be impossible to determine the invoice value of a cargo of Douglas Fir to suit the capacity of the schooner "W. H. Marston" in the required specification lengths, breadths and sizes, where delivery is to be made to any other receiving medium, unless such capacity was known, and that such capacity was not known.

Third: The record and plaintiffs' proof fails to show that the lumber purchased December 7, 1917, at \$22.50 net Base "G" List was of such lengths, breadths and sizes as would constitute a cargo "to suit the capacity" of the schooner "W. H. Marston."

Fourth: The record and plaintiffs' proof fails to show the number of feet, of the several lengths, breadths and sizes of (the specification) lumber for a cargo to suit the capacity of the schooner "W. H. Marston," and therefore the proof furnishes no basis for applying to the various sizes, the "G" list base sale price of \$9.50, or the "G" list base purchasing price of \$22.50.

Fifth: The records show and the proof is, that the contract gives defendant the option of making a delivery either on the mill wharf, within reach of vessel's tackles, or on barges, at ship's tackles, mill

wharf; or on both mill wharf and barges at ship's tackles.

As to one of these optional places of delivery, plaintiffs' sworn complaint alleges, defendant's answer admits, and the proof shows, that the phrase of the contract "on barges a. s. t. mill wharf," means and was understood by both parties to mean "on barges, at ship's tackles, mill wharf." There is no evidence that defendant ever waived its option to deliver "on barges at ship's [143—76] tackles mill wharf," and the inference is conclusive that in order to make such a delivery a vessel must be actually present at the mill wharf, and there is no evidence that the "W. H. Marston" or any other vessel was there.

Sixth: The record shows and the proof is, that the plaintiffs failed to have the schooner "W. H. Marston" present at the mill wharf of the Knappton Mill & Lumber Co. on the Columbia River, the agreed loading place, at any time between Oct. 1st, 1917, and December 31, 1917, inclusive, and therefore plaintiffs failed to perform a condition precedent to a delivery by the defendant between those dates, of a cargo to suit the capacity of that vessel.

Seventh: The record, the proof, and the applicable law shows and is, that the sale in suit was one for a cargo and not a definite number of feet of lumber, and that such cargo was one to suit the capacity of the schooner "W. H. Marston." And I have here in my written motion recited, for the Court's convenience, a number of cases.

Nor is there any evidence that said schooner's capacity was known or that said schooner was present at the agreed loading place at any time within the agreed delivery dates, so that the capacity might have been ascertained.

Eighth: The record shows and the proof is, that the naming of a vessel to receive delivery of the cargo of lumber sold, was for the benefit of defendant, for the reason, *inter alia*, that it gave to defendant a means of ascertaining, with some measure of accuracy, the time between October 1st and December 31st, 1917, at which it would be called upon to cut and furnish the specification lumber, and that this benefit was never waived by defendant and could not, as matter of law, be waived by the plaintiffs.

Ninth: The record shows and the proof is, that the naming of the schooner "W. H. Marston" to receive delivery of the cargo of [144—77] lumber sold, was for the benefit of defendant, for the reason, *inter alia*, that such a delivery was a guarantee and an assurance to defendant that the lumber would be exported and the sale therefore was such as was within the power of defendant to make.

Tenth: The record shows and the proof is, that a delivery to a barge such as was demanded by plaintiffs, or to any medium other than a vessel, is not a delivery to a ship for export shipment. (Requirement of "G" List.)

Eleventh: The record shows and the proof is, that the price of \$9.50 Base "G" List was a price for delivery to an exporting vessel ("G" List so provides),

and there was no such vessel present within the agreed loading period at the agreed loading price.

Twelfth: The contract on its face shows, that the time of delivery was such time, within the limit of October 1st, 1917, and December 31st, 1917, as would be determined by the arrival at the agreed loading port of the agreed carrying vessel, the schooner "W. H. Marston."

Thirteenth: The record shows and the proof is, that the failure to have the "W. H. Marston" present at the agreed loading port within the agreed time, effects the subject matter of the contract, the character of the commodity sold, the time of delivery, and the place of delivery and was a condition precedent to performance by the defendant.

Fourteenth: The record shows that the present case was prematurely brought in that the delivery date named in the contract did not expire until December 31st, 1917, and the complaint was filed December 27th, 1917.

Fifteenth: That the evidence adduced by the plaintiffs is not sufficient to support a judgment.

The Court subsequently denied defendant's said motion for [145—78] a nonsuit.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 9. [146—79]

Deposition of E. G. Griggs, for Defendant.

Thereupon the deposition of E. G. GRIGGS, a witness called on behalf of defendant, was offered and admitted in evidence, but was not read to the Court.

Direct Examination.

My business is that of President of the St. Paul & Tacoma Lumber Company. Our plant is located on Puget Sound at Tacoma. I have been connected with the St. Paul & Tacoma Lumber Company about 28 years. Their business is the manufacture of lumber and all the products in connection therewith. We ship by rail, coastwise, export and local. We have done an export business ever since the organization of the company. I have been connected with the company since 1891. It was organized in 1888-89. I have been president of it for ten years, I think. I had some slight experience in the Beaver Lumber Company in Wisconsin, before I came West. In the export business of my company, I have had something to do with the export in cargo lots of lumber. The export is in both cargo lots and lot shipments, but cargo lots is largely our business. By cargo I mean vessel and steamer cargoes. By a cargo I mean a sailing vessel that loads complete with a lumber cargo, or a steamer likewise. I am familiar with the trade terms used in the export business of lumber in cargo lots. I am familiar with the expression "f. a. s." In cargo lot sales f. a. s. there is a custom touching the question of the place of

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delivery. "F. a. s." means "free alongside vessel at ship's tackle" with reference to the mill that is making the sale. The custom of the business is to deliver the lumber free alongside ship, within reach of the vessel's tackle. I have never known of any other custom and I have been in the business for thirty years. There is a custom known to the trade in "f. a. s." sales where there is a definite number of feet named in the contract, coupled with the expression "15% more or less to suit capacity of vessel," [147—80] touching the manner of ascertaining the amount of lumber in that cargo. The 15% allowed to suit capacity of the vessel is determined as you load the vessel. You are delivering the lumber and you are supposed to vary 15% on the amount of lumber furnished to suit the requirements of the vessel as she is loaded. If for any reason the vessel tonnage is calculated a little differently than the cargo would stow, and the way she was trimmed with the ballast would determine, and she would take 15% more, the mill would have to furnish the lumber. If she would not carry quite the deckload, or carry quite the capacity of her rated tonnage would figure, she would carry 15% less, or such percentage as would load the vessel. Such contracts are common to the trade where there is a definite number of feet coupled in the contract with the expression "15% more or less to suit capacity of vessel." I am familiar with the way such contracts are generally made. In such contracts under this custom as I have testified to, the

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method pursued in determining the amount of the cargo sold is to furnish the vessel cargo and load to capacity as required by the master, furnishing the 15% if this is required. I should say that it would be impossible to determine the exact amount of cargo sold under the contract prior to the actual loading of the vessel. The master of the vessel is governed by the marine surveyor in determining how much he can take. There is a Board Surveyor, generally, that issues a certificate as to the vessel's condition to take the cargo, and he also determines how high he should go with the deckload, or what the amount of the cargo should be, depending on the seaworthiness; a United States Marine Surveyor. I think the judgment of the master is governed by this marine surveyor's judgment, and I do not know whether he can go to sea in this country in defiance of the marine surveyor or not. But he is generally governed by the marine surveyor. There is practically [148—81] no difference between the terms "f. a. s. mill wharf" and "f. o. b. mill wharf within reach of vessel's tackles" or "on barges mill wharf at ship's tackles." I know of the expressions "at ship's tackle" or "within reach of ship's tackles." Such expressions in an export contract are for the benefit of both the seller and the buyer. Such an expression is for the benefit of the seller in that it determines where you can deliver the lumber on your wharf, within say, two lengths of the side of the vessel, on your wharf. And if, for any reason, your wharf

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is occupied with some lumber, you could then deliver it in a lighter alongside the vessel within reach of the ship's tackle. That would give you the benefit of two deliveries, and also give you the benefit of bringing lumber from other sources than the one mill, and is a decided advantage in furnishing cargo. The benefit to the seller in making or providing two places of delivery to the ship is that if any one cuts lumber ahead and has it on his wharf, to provide against demurrage that is generally applicable on all charters, he can also deliver on lighters alongside the ship and expedite delivery and save the re-handling of a great deal of lumber and put it all within reach of ship's tackle. The expense would be considerable to him if he had to rehandle lumber. It is an advantage to the mill to expedite the delivery of the lumber. Sometimes it is very necessary. It is an advantage if the vessel is on demurrage and you want to expedite the loading of the vessel, you can deliver them both ways and work different hatches and increase the loading of the vessel so that you can save considerable trouble and demurrage. Another advantage, I think, I have mentioned is that in handling cargo the deliveries in both ways was an advantage. You can bring lumber from other mills if you are tied up with your mill, by reason of your demurrage, you can bring lumber from other mills and put it alongside in lighters and very quickly expedite [149—82] the loading and delivery of the cargo and save yourself demurrage. The space on a loading wharf is

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vital to a cargo man. Delivery at the mill wharf from alongside is more advantageous to the mill than delivering to the lighter. The only benefit of a lighter would be if the purchaser paid the expense of loading the lighter, and also handles the lumber from the lighter to the vessel when she is delivered alongside. As between delivery from the wharf to a vessel at ship's tackle and a delivery from the wharf to a barge alongside the wharf, there is not so very much difference as I understand the question. The only advantage would be in the tackles of the ship being able to keep your wharf clear and delivery clear when it is delivered direct to the ship. If it is delivered to a lighter and they are equipped in that way to handle the lumber. It is impossible in a contract for cargo sales to suit the capacity of a named vessel to know the amount of lumber sold in advance of actual loading of the vessel. It is impossible to know the invoice price to be paid for the lumber in advance of actual loading unless you simply assume specifications which might or might not be delivered. You have a base price. You cannot tell until it is delivered what your invoice price is going to be. The sales are all made on the basis of a list which takes the base price, and from that, either up or down, there is a variation, depending upon the various sizes, lengths and grades that you deliver. I recognize the paper which you show me. It looks like an Australian cargo or Melbourne cargo, export. I am familiar with specifications of Australian cargoes. 6x12 on

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there would remind me of one. Referring to my answer with regard to the meaning of the term "base price," I would say if you take a base price, according to the list—the list is gotten up on either a ten or twenty-dollar base. Such items as, for instance, excessive amounts of 6x12, generally admit [150—83] of an addition to the listed price of say, two dollars, possibly more, determined largely by the provisions of the contract of sale, or agreement with the seller, the question of lengths. The list is generally based on 16 to 32, and if short lengths from 12 to 16, they would take a lower price than the base price. 32 to 40, 33 to 40, 71 to 80, you would follow your list and get a different price on each item. You would then carry these different items out on the basis of your list, and the total invoice would be determined by what they would figure. I notice you have selected items here that take a higher price than the base, because they are generally three to five dollars better in grade, and that is a quality specification which is protected in the list. Assuming that these are the specifications for a cargo to suit the capacity of a named vessel, it would be impossible before the actual loading of that vessel to know the number of the different sizes and grades that would go into that vessel. Using barges as the receiving medium, instead of a ship, I don't think you could possibly determine the amount of lumber stated in the specifications that would be required to suit the capacity of a named vessel, until you load the vessel, because I notice

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here you have all kinds of lengths and you might not be able to stow those on the vessel; you might not be able to carry them. There are so many questions that come up in loading a vessel that alter the specifications, as to her ability to carry the particular cargo, that you cannot tell until you load the vessel. These questions that I have referred to as being numerous, do not apply to barges, you can put anything on a barge. Through loading of these specification pieces on a barge, I do not think that you could possibly secure the results with regard to the price of the cargo until you had loaded the vessel.

Thereupon the specifications above referred to were marked [151—84] “Defendant’s Griggs Identification 1.”

WITNESS.—(Continuing.) I want to add that I understand your contract is to load the vessel to capacity. My answer is based upon that. I know what a bill of lading is. Bills of lading are issued for cargo shipments, they are filled out by the mill furnishing the cargo and signed by the master. It would not be possible in a cargo sale to suit the capacity of a named vessel where there are furnished specifications to issue bills of lading in advance of the actual loading of the vessel to her capacity.

Cross-examination.

There is nothing impossible about delivering a cargo of these specifications to a barge. Any lumber can be delivered to a barge that is on specification. This lumber could have been delivered to a barge,

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but as to the lumber to be put on a barge there are certain definite specifications where definite amounts of each item can be delivered to the barge. I have seen that paper which is now handed to me (referring to Defendant's Griggs Identification 1). I saw it yesterday when it was showed to me by Mr. McClanahan. With regard to whether or not there was any particular object in turning down the top, I don't recollect about that top, I was looking at the specifications. My company manufactures fir, spruce and cedar. It is a member of the Douglas Fir Exploitation & Export Company. It is interested in the Douglas Fir Exploitation & Export Company, being one of the stockholders. It is also a member of the Pacific Lumber Inspection Bureau which works with it. I am a member of that Bureau. I don't think the company is a member. I will correct that—the company is a member and I represent the company in it. My company is directly interested in the outcome of this litigation as it affects the Douglas Fir Exploitation & Export Company. I assume that my company is affected by the outcome of this suit. Anything [152—85] that affects the Douglas Fir Exploitation and Export Company affects the several interests. My company, the St. Paul & Tacoma Lumber Company, has always been engaged in the export business. It ships about one-third of its capacity in good years, depending on the market, or it might ship one-half its capacity. Its capacity is rated at 120,000,000 feet. That would amount to an export

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of fifty or sixty millions a year, but it might vary. We might ship a quarter or a half as export, if the market is good. We call export ports anything away from the United States and its dependencies. I do not think the Philippine Islands is considered as export. I don't consider the Philippine Islands as export when I speak of the 50 or 60 million feet. It is an entirely different market. I will correct that. I would say Manila would be export. The Hawaiian Islands would not. That is handled on a different basis, and the Douglas Fir Company has nothing to do with it. I do not think the Douglas Fir can sell any lumber to Manila. I do not know of any cargoes there. All the export business we sell is connected with the Douglas Fir and handled by that company. It all goes through that company. Our mills are situated at Tacoma on Puget Sound. I would not consider that there is any difference between an export cargo and a domestic cargo. This question of the loading of a vessel coastwise to San Francisco would be a cargo, but it would not be covered by the export company. That is not in their field of business. The export business is handled by cargo. And domestic it might go anywhere without being a water-borne shipment. If we were selling a cargo to San Francisco the term would mean precisely the same as if we were selling a cargo to Melbourne, but covered by a domestic port. The term "cargo" does not mean anything different in export than it does in domestic business. The meaning of the term "f. a. s. mill wharf" is

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that it is on the mill wharf, free alongside the [153—86] vessel tied up to the wharf. That would be my exact interpretation. Delivery of the lumber free alongside the vessel tied or moored to the wharf. The term “f. a. s.” means free alongside ship on the mill wharf. “F. a. s. mill wharf” means you should deliver on the mill wharf, free alongside the vessel. I say “free alongside the vessel” because that is my interpretation of “f. a. s.” The vessel must come to the wharf to get the lumber or we must deliver it free alongside on barges. There is a difference between “f. a. s.” and “f. a. s. mill wharf,” because you might put it alongside the vessel on lighters in the harbor. In other words, when I use the term “mill wharf” it means it is to be placed on the wharf, that part of the destination is fixed by the term “mill wharf.” I interpret the term “f. a. s.” to mean free alongside. “F. o. b. mill wharf” means practically the same thing, delivery down there without cost to the vessel. In the term “f. o. b. mill wharf” it would be assumed that the vessel would come there and take it f. o. b. mill wharf. I think that the term “f. o. b. mill wharf” itself means delivery there on the mill wharf without cost to the vessel to bring it up from some portion of the wharf that they could not reach with the tackle. The responsibility of a seller ends when he places it on the wharf, provided it is delivered within reach of the ship’s tackle at a certain place on the wharf. It has got to be within reach of the ship’s tackle. From that point it is the duty of the

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buyer to take it. The buyer must take it as fast as the mill can get it down, that is all he generally attempts to do. So long as he does that he complies with his obligation. I do not know that the expression "on barges mill wharf" is ever used. "On barges a. s. t. mill wharf" means "at ship's tackles." You could put the lumber on barges and deliver alongside the ship, that is what we would be obligated to do under that contract. The vessel might lie in the [154—87] stream and you might give them alongside ship's tackle on a barge. I said there was practically no difference between the three expressions "f. a. s. mill wharf," "f. o. b. mill wharf vessel's tackles," and "Barges mill wharf ship's tackles." It is the custom of the port to have that in, in order to expedite delivery. I would assume there would be very little difference. There is practically no difference, except in handling to the barges in place of handling direct to the ship. It gives you three ways to furnish lumber. There are three different ways employed by these statements—I would say "f. o. b. mill wharf" does not determine absolutely that the lumber must be alongside ship within reach of the tackle. "F. a. s." specifies definitely it must be alongside ship. The customs of the port is that it must be within reach of the tackle. "F. o. b. scow mill wharf" means that the lumber might be delivered on the mill wharf or put on lighter and delivered alongside vessel at another hatch, which is often the custom of the port. So that they could work two hatches,

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and it would be without expense, of course, to the seller, the ship furnishing the lighters. Very often mills have lighters of their own to assist in delivery on that account, and whenever loading a particular cargo, in order to expedite delivery they have lighters and work different hatches from the lighters while they work from the dock, expediting delivery. You might bring lumber from other mills and help you out; then you have complied with your contract when you have brought the lumber alongside the ship.

Q. Now, I understand you to say if your lighter was alongside of the barge, you have not complied with the contract?

A. You might take on your lumber on a lighter; I don't know how you could determine what your vessel would take.

WITNESS.—(Continuing.) So far as the delivery is concerned, you could take it on a barge. I think that it would be more of a disadvantage [155—88] to the seller than to take it on a ship. You are not rigged to take it over as fast as you can get it. If the barge was rigged it would make some difference so far as the obligation of the seller was concerned. It is practically correct to say that these clauses, so far as determining the place at which the seller is to deliver the lumber are concerned, are the same whether the buyer should choose to take it on a barge or to take it on his vessel. If the barge was equipped in the same manner to take lumber as it is taken on the ship,

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I think the obligation upon the seller would be the same in all three clauses.

Q. There would be no difference between that obligation than the obligation to deliver to the ship, assuming the barge was equipped in like manner?

A. I do not know that I answered that correctly. The condition of the business is so definite, you could not possibly deliver lumber on a barge on the same kind of contract for a full cargo that you would have for the vessel, one is used to help the other.

WITNESS.—(Continuing.) I mean the full cargo clause. Where a sale is made for a definite number of feet and 15%, more or less, to fit capacity of vessel, the manner of ascertaining the sale is to load the vessel. If the vessel requires more than 15% more than that amount it is subject to special contract. In the case of a contract which calls for a definite amount and 15% more or less to fit capacity of vessel, and in a case where it turns out that the vessel is of a larger capacity than the 15% more than the amount named in the clause, the seller is not obligated to go on delivering above that amount. 15% being definitely stated as the lumber, he would stop there and negotiate specially for the additional lumber to fill to capacity. He certainly would negotiate specially. I have done it and I know. That is all I [156—89] have done. He would not be bound to do it. Under that particular contract of sale he would not be bound to make any additional contract to deliver further. According

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to the customs of the port, if he is not loaded to capacity I think he would be bound. Assuming a contract of a million three hundred thousand feet, a clause of 15% more or less to suit capacity of the vessel—assuming that the vessel has a capacity of two million feet—I think that the seller could stop when he had delivered 15% more than the one million three hundred thousand feet. I don't believe that there is any contract that would ever be interpreted that way, if you had "to capacity of the vessel," if the capacity of the vessel varied that much, which is theoretical, because it never would, there is an obligation of the mill to load the vessel. I think if it went over 15% and he demanded that, the custom of the port would be that he would negotiate at a price for the additional amount of lumber. That price might be more or less than the amount named in the contract. If the vessel turned out to be smaller than 15 per cent less than the definite amount named, and that point was reached and the vessel was full and could take no more lumber, and yet they had not reached the 15% less than the definite figure named, the buyer would have to take that lumber and probably arrange for additional cargo on the rest.

This certificate of inspection that I speak of is issued to the vessel when loaded. It is issued by a Government officer, the marine surveyor's certificate. There is also the inspection certificate. I was asked about a marine certificate, surveyor's certificate as to the vessel's condition to take the

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cargo and her ability to take the cargo, whether she can take more or less, that is what they generally determine. That is all determined by the marine surveyor and the master of the vessel. It does not affect the obligation of the seller to deliver, it simply affects [157—90] the contract that is covered in that 15% more or less. Ordinarily, that is on her definite 15% more or less clause. The other certificate that I have spoken of is the lumber inspection certificate. I would not have mentioned it if you had not referred to it. There is nothing impossible about putting lumber on a barge and then afterwards putting it on a vessel.

Redirect Examination.

The extent of stock ownership of my company in the Douglas Fir Exploitation & Export Company is nominal, just what we have to take in order to become members of it. I do not recollect just how the shares are. We are simply members of the bureau on some definite basis. As to membership, we are all in on it. The Douglas Fir is a sales organization for export lumber. The term "f. a. s." implies the delivery alongside a ship. There is a difference between the expression "f. o. b." standing alone and "f. o. b. within reach of ship's tackle." On cross-examination I said that it was my understanding that the barge was being used by the buyer in taking a delivery. I have never known of a buyer taking delivery of a cargo, that is, an export cargo, on barges. I was talking about something on cross-examination that I had never heard of

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before. I have never seen a cargo handled on barges. Partial lots only would be delivered that way. Barges are used in cargo sales in such transactions in this port in loading vessels to expedite delivery and in getting lumber from different mills to assist in loading; we often deliver on barges alongside vessel at the wharf. The seller often does that. For only cargo lots, that is the only use I know of for using barges in connection with cargo sales for export. I said that there would be no obstacle in taking delivery of these specifications, lengths, breadths and sizes on barges, the definite figure intended by the parties in agreeing for 15% more or less is the capacity of the [158—91] vessel, the supposed amount that she will carry on the rated tonnage of the particular vessel, the capacity of the vessel. It is very necessary to have that estimate of the vessel as to what she will carry.

Recross-examination.

We have no mills on the Columbia River, nor at San Francisco, nor at Eureka Bay, nor have we ever loaded vessels from these points. I did not say exactly that we never loaded or ever knew of lumber being put upon a barge and subsequently put upon a ship; I said I never knew of a full cargo being loaded on barges of the capacity of a vessel to load, the ship cargo, the full cargo being put on barges and being handled to the vessel. I have often handled lumber by loading it on a barge and then taking it from the barge and putting it on the

(Deposition of E. G. Griggs.)

vessel, but I never knew of a cargo mill taking a cargo and loading it on lighters and putting it out to a vessel for the full amount of the cargo. I have known of them taking parts of shipments and handling the cargo both ways. Some rail mills might ship in parts of cargoes and put it on to scows and deliver the cargo that way because they are not equipped with a wharf. Any cargo mill that has a wharf simply utilizes the two means of delivery alongside. There are some mills in California that sell without having any wharf at all. In such sales as that I am not familiar with the custom of the port. These mills deliver on barges alongside ship's tackle wherever she lays. The railroad delivers it alongside some wharf, generally the railroad wharves. There is nothing impossible about sending it by rail; where it is shipped by rail here it is handled and put on barges and delivered alongside the vessel. I know of several inland mills here that ship here and from Tacoma in cargo lots. I know one mill, the Pacific States Lumber Company. [159—92]

Deposition of E. G. Ames, for Defendant.

Thereupon the deposition of E. G. AMES, a witness called on behalf of defendant, was offered and admitted in evidence, but was not read to the Court.

Direct Examination.

I am sixty-three years of age and engaged in the lumber manufacturing business. I reside in Port

(Deposition of E. G. Ames.)

Gamble. My business is situated at Port Gamble and Port Ludlow on Puget Sound. That business is the manufacture and shipment of lumber. We do an export business mainly. The firm has been in that business for sixty-three years. I have been connected with the firm for forty years. My connection with it is manager. I have been manager about five or six years. I have no other business, although I am connected with a great many other business institutions that are connected with the lumber business. One of them is the West Coast Lumbermen's Association; the Douglas Fir; and the Pacific Lumber Inspection Bureau. I am president of the Pacific Lumber Inspection Bureau. I am treasurer and one of the directors or trustees, as we call them, of the defendant in this case. The name of our mills is the Puget Mill Company. The Puget Mill Company is also a stockholder in the Douglas Fir. Some of the larger firms put in more money than the smaller ones. I think we have \$10,000 in it. The output of our mills, on one shift a day, is one hundred million a year. With regard to the proportion of that which is for export, we have never done any other business but cargo business, until within two years. All of our lumber has been shipped on vessels, water-borne cargoes, domestic and foreign, and the amount that has gone domestic and foreign has varied according to market conditions. I imagine forty per cent of our output has been exported, perhaps a little more. The last year I do not think we exported over eight per cent.

(Deposition of E. G. Ames.)

That is from forty millions to eight millions. Not because of lack of tonnage but [160—93] because of conditions. These conditions were not peculiar to us. We have gone into the rail business and shipped some by rail during the last two years, and we are getting ready to do both kinds of business.

I am familiar with the terms that are used in cargo sales for export. The meaning of the expression “f. a. s. mill wharf” is free alongside the ship, on the dock within reach of the ship’s gear or tackle. In a contract for export it has the following significance: We receive a contract to load a vessel and furnish a cargo of lumber. The ship expects to berth at the dock; the dock facilities at the sawmills are limited. Now, we also agree to give her certain dispatch. We accumulate lumber as fast as we can. And when we accumulate that lumber, we have already designated where a certain ship is going to load a certain cargo. Now, that lumber is usually within the limits of the lines of the gear of the ship to pull it out on to the dock, get hold of the lumber and drag it on board—that is a delivery. And when it says “Free alongside,” my opinion would be that that is to do away with the condition—excepting in a place like Seattle, where they would have to pay wharfage. Now, the mill charges no wharfage, no dockage or anything of that kind. We simply agree to furnish that lumber free of any expense to the ship where they can get hold of it, within reach of the ordinary gear. It is the question of delivery that that

(Deposition of E. G. Ames.)

phrase applies to. There is a custom touching the question of the place of delivery in cargo sales that are made f. a. s. mill wharf. That custom is that you have to put that lumber within reach of the ship's tackles, free of any expense to the ship up to that point. And another thing, the delivery, according to custom, is when the ship puts her line around that load of lumber to take it aboard. There is a custom touching the question of the ascertainment of the amounts of lumber sold where the contract [161—94] names a definite amount, coupled with the expression "15% more or less to suit the capacity of the vessel." That custom is that the vessel is estimated to carry, say, thirteen hundred thousand, she might carry more or she might carry less. And to make it definite as to how much the seller is obliged to furnish or how much you have sold to the buyer and can make him pay for, why, that 15% will say—one or the other—is always incorporated in the contract where you are to furnish a full and complete cargo. Under such a contract it is not possible to know how much lumber has been sold in advance of the actual loading of the vessel. Under such a custom it is not possible to know in advance of the loading the invoice price of the cargo sold. A sale made f. a. s. mill wharf of a cargo to suit the capacity of a named vessel, cannot be delivered to barges without the capacity of the vessel being known. No vessel will carry the same amount of lumber twice in succession. She might carry a dozen cargoes and all vary, due to various conditions. For in-

(Deposition of E. G. Ames.)

stance, we have loaded vessels time after time, contract after contract, and when they get down to their loading marks, still the deckload may be 18 inches lower than it was on some other trip on account of weather conditions—water, snow, ice, and there might be a great many things. I would not know how much a vessel would carry when we commenced to load her even. I would not know it until she got through being loaded.

I have heard of the expression “f. a. s. mill wharf.” I have heard of the expression also of “f. o. b. mill wharf within reach of the vessel’s tackles.” Technically there might be a difference between f. o. b. mill wharf and f. o. b. mill wharf within reach of vessel’s tackles. The expression “f. o. b. mill wharf” necessarily requires the presence of a vessel. The expression “f. o. b. mill wharf within reach of vessel’s tackles” certainly requires the presence of a vessel. I do not think there is any difference between the meaning [162—95] of f. a. s. mill wharf and f. o. b. mill wharf within reach of vessel’s tackles. I know of the expression “at ship’s tackles,” or “within reach of ship’s tackles.” It is a new expression. It is “a. s. t.”; it has come in in the last ten years. It has the same meaning as “within reach of ship’s tackles.” That expression is familiar to me now. That expression is put into the contract to make it definite what the delivery is, so that the seller knows what he has to do. It is put in for the benefit of both parties so that there is a clear understanding just

(Deposition of E. G. Ames.)

what you have to do. The question or matter of dock space is certainly of materiality to a mill. The question of ship's tackle has nothing to do with dock space. The benefit of the expression to the seller is that he knows that he has to deliver that where the ship's gear can get hold of that lumber, that is all. The dock space has nothing to do with that so long as you get within reach of any gear of the ship. I think there is a difference to the mill between a delivery from the mill wharf, taken by a vessel, or delivery from the mill wharf taken by barges. It would differ with the way different plants are planned, and the way our plants are planned. With regard to what difference is, the important thing in taking deliveries is the availability of our dock spaces, to keep your mill going, and you have a certain amount of lumber which you have to furnish to a vessel, and it is important to you that the vessel at least takes that quantity of lumber, so that she don't use that dock any more than absolutely necessary. Under ordinary circumstances that cannot be accomplished by a barge taking delivery as readily as by ship taking delivery. In sales of cargo lots for export, made to suit the capacity of a named vessel, it is not possible, in my opinion, to make delivery of that cargo to a barge to suit the capacity of a named vessel. It is impossible to know the prices of a cargo sold to suit the capacity of a named vessel [163—96] if the lumber is attempted to be loaded on to a barge. Looking at the exhibit marked

(Deposition of E. G. Ames.)

“Defendant’s Griggs Identification 1,” purporting to be specifications, I would not know how these specifications for a cargo to suit the capacity of a named vessel could be fulfilled by loading on to barges. Of course you can put the lumber shown on these specifications on to the barge, but you could not put it on to a barge so as to suit the capacity of a named vessel. The reason for that is that if I were going to do that I would want a definite amount. You could not put these lengths, breadths and sizes to suit the capacity of a named vessel on that barge unless you knew exactly what the ship was going to carry. I could not fill that order in proportion. It is possible to ascertain the amount a ship is going to carry only as you load her. We would under-saw or increase, from time to time, until she was finished. I might make that clear. If we sawed that 6x12, the whole of it, and put it on board the ship, and then she did not carry the total amount of this order she would be overshipped in some items and some other items would not have the proper amount. Theoretically, the captain of the ship determines when a ship is loaded to her capacity. Practically, it is the marine surveyor. He issues a certificate when she is loaded. I have never known a marine surveyor to issue a certificate until the vessel is actually loaded. He designates the point down to which she can load. When she gets there she is stopped. If they don’t stop, they don’t get a certificate. I have known them make ships discharge lumber.

(Deposition of E. G. Ames.)

I have said that I am president of the Pacific Lumber Inspection Bureau. They print these lists called "G" lists and have them for sale. I know that that list contains certain terms of sale. Where a contract is made subject to the terms and conditions of "G" list, the certificate issued by the surveyor cannot [164—97] be issued until the vessel is loaded and specifications and schedules made up complete. Our Bureau inspects lumber aside from lumber that is loaded on vessels. With regard to whether or not it would issue a certificate for lumber that was inspected in a warehouse, I would say that the certificate would have to state the exact fact. We would inspect it if asked to do so, but the certificate would state where it was inspected and the time.

Q. What does the expression, with reference to the prices of lumber \$9.50 base "G" list, mean?

A. "G" list is not the list in force now. As I remember it, it was \$20.00 list. That is, the base price is supposed to be \$20. Now, the prices of every size and different grades and lengths of lumber provided by that list, was all rated in value comparatively to twenty dollars, which applied to some particular size or sizes of lumber of a certain grade. Lower grades would be less here; higher grades, larger sizes and wider widths and longer lengths would be more; the differential applies there.

Q. If the base price is \$9.50, would that \$9.50 base apply to these various lengths, breadths and sizes enumerated on this schedule identification

(Deposition of E. G. Ames.)

Griggs 1, the specifications which have been marked for identification?

A. That would mean whatever price shown by the list, say 6x12, 16 and 32 feet long, if that is correct, is as appears in the list, that it would be as many dollars less than that price as \$9.50 is the base of the list—that would be \$10.50. So you take ten and a half off of every price listed in the list; that you would figure this up on the value of the list and check off ten and a half in there—it amounts to the same thing.

WITNESS.—(Continuing.) The base price of \$9.50 applies to [165—98] every item in the order. It does not mean that every item in the order is worth \$9.50 a thousand. There are different prices for all these different sizes. There are different prices for all these different sizes, these different grades and lengths, and also for these two qualities. Now, there is one included which I presume is merch., this says select. And there is a different price for the better grades or select.

Cross-examination.

The prices of the lumber indicated on Defendant's Griggs Exhibit 1 for Identification can all be figured out. If the sale was \$9.50 base "G" list, less two per cent and 2½ per cent, you could figure it out according to the list. That would not show what the value of that lumber was. I doubt if you could get these figures in feet, board measure exactly, as shown on this list, because you take the 6x12, 40 feet long.

(Deposition of E. G. Ames.)

There is a certain number of feet in it. If this amount is not divisible by that, you could not fill it exactly. There might be a fraction more or less. A fraction of the contents of an average piece, more or less, you could not tell. As to 33x40, 16x32, you would not know how many pieces there would be. You would not know just what you would have of the 33, 34, 35, 36, 37, 38, 39, 40, or as to how many pieces of each length. You would not know until the ship was loaded. The 200,000 feet here would not indicate it at all. You could not tell. It might vary a thousand feet more or less. You would have to figure all that up and find out just exactly what there was. You could not do that in advance. You could not do it until you had shipped it. If this lumber were on a barge you could figure out the price of it as to what went aboard the barge. It could be put on a barge. If you are going to put that amount on a barge you would want a definite order. It is not sufficiently definite because the chances are that buyers and sellers [166—99] of lumber, particularly the buyers, are very technical. If they can see a chance to get anything on the poor seller they will take advantage of a technicality. When we deal with them we want things understood.

Q. Are the buyers so—

A. Yes, they certainly are.

WITNESS.—(Continuing.) I certainly represent the seller's point of view; I know what I am talking about. I have had trouble making settlements with any of them. I am quite sure I have had

(Deposition of E. G. Ames.)

trouble and differences with the Comyn Mackall Company. Our relations are very friendly, though we have had our business troubles. I have not any of these troubles at present, that I know of.

Q. Then I understand you to say if the lumber was sold f. a. s. mill wharf, or f. o. b. mill wharf within reach of ship's tackle, or on barges mill wharf at ship's tackles, the obligation of the seller has ended when he has put the lumber at the place specified in your definition?

A. Yes, that is what we expect to do.

WITNESS.—(Continuing.) That is our obligation. It is up to the buyer to take it at that place. If he comes along with his vessel that was named, why I would not hesitate, but I certainly would not deliver to anything else unless I had a thorough understanding as to where we stood, and I might have reasons for refusing, anyway. It would be in the contract. The vessel is named in the contract as part of the contract. When I mentioned 1,300,000 feet when counsel asked me in regard to the 15% more or less than the definite figure, I did not have this particular sale in mind. I meant any sale. There is nothing in the 1,300,000 feet that would be different from any other sale, that amount of lumber, 15 per cent, more or less. It would state a definite amount. Might be a million, might be eight hundred thousand. Might be six million, [167—100] according to the ship. But nobody knows exactly how that ship is going to take this 15 per cent more or under, that is the limit. When we get over

(Deposition of E. G. Ames.)

that 15% the seller would not quit. I will tell you what I would do. I would not furnish any boat, under certain conditions I could conceive that would exist, without a new contract or understanding. I would stop. On the other hand, if I had sold the minimum amount and the ship did not take it, I would expect them to take it and pay for it, under certain conditions. If they could not take it on that vessel they would have to make arrangements. I would consider I had a fair claim, if I wanted to enforce it. I did not say exactly that there is nothing impossible about delivering this lumber to a barge and then the barge subsequently putting it on the named vessel. Before I would do a thing like that, I would think that I had a right to refuse to do anything that was contrary to my orders. There is no physical impossibility. You can do most anything.

Q. And if it was put on to the barge physically, it would be, of course, the duty of the seller to get it off on to his ship—the duty of the buyer to get it on to his ship?

A. I do not think the mill furnishing—it sells through a second or third party, sometimes they go through four parties—that he has any right to consider the contract other than technical and stick to it.

WITNESS.—(Continuing.) Speaking not of the construction of the contract but the physical fact of delivering the lumber on to a barge and thereafter delivering from the barge to the vessel, I would say that we could put it on top of the sawmill if we wanted to. Under this contract, or any contract

(Deposition of E. G. Ames.)

containing a clause such as I have been speaking of, f. a. s. mill wharf or f. o. b. mill wharf alongside vessel or on barges at ship's tackle, the seller having put it there, I don't think I would permit the buyer to take it [168—101] from a barge and put it on his vessel. I think physically he could do it, but I don't think I would permit it. I can put it on top of the mill if I want to. Probably I would not be putting it in a different place under that arrangement in case his vessel was actually able and did reach the side of my wharf. Physically you can do anything. That is the delivery we calculate to make. We calculate to stop when we put it on either our wharf within reach of ship's tackle or on our lighter alongside the vessel, and we expect to stop there. We expect the buyer to take it from either of these points, according to his contract, depending on what the contract says. I would expect him to take it from those points, if that is provided by the contract. Under this custom of delivery it is customary for him to take it then and there at these points.

This Bureau, of which I am president, would inspect the lumber wherever they were asked to inspect it, and our certificate would show the place where and when it was inspected. There is no essential difference between these customs as to delivery and definitions of these terms, between sales in domestic and in foreign or export business. We ship all our export business through the Douglas Fir Exploitation Company. I am treasurer and a trustee of the Douglas Fir. This expression "a. s. t." is a new one.

(Deposition of E. G. Ames.)

It came out within a few years. It means alongside ship's tackles, at ship's tackle; within reach of the ship's tackle, it is all the same; it means at ship's tackle. There is nothing impossible about a barge taking 60,000 feet a day if they are fixed up for it.

Redirect Examination.

With regard to what I said concerning a certificate of inspection in a warehouse, for lumber, or some place other than on a ship, it would be the same certificate where the lumber is inspected [169—102] on a vessel; it would be a certificate on the form and terms and conditions as of "G" list, where the inspection was in a warehouse. If the Bureau was instructed to inspect and tally lumber in accordance with "G" list, that would cover the grades provided; we would not know about anything else. We would not know about any contract. I remember the conditions under which the certificate is issued, where the loading is on a vessel. These terms and conditions could not be fulfilled if the inspection and certificate were issued on lumber in a warehouse.

Recross-examination.

By that I mean it would show the lumber was in a warehouse. It would not follow it up by saying where it went. It would give the same grade and the same tally, but show that it was in a warehouse. I think I saw this paper which was exhibited to me by counsel yesterday afternoon, but I did not notice it particularly, I could not identify it. I paid little attention to it. If a vessel took on more lumber than the United States Marine Surveyor permitted

(Deposition of L. A. Mansur.)

it to carry, it might have to discharge lumber. As to where it would have to discharge the lumber, I do not know; that would be a complication. [170—103]

Deposition of L. A. Mansur, for Defendant.

Thereupon the deposition of L. A. MANSUR, a witness called on behalf of defendant, was offered and admitted in evidence, but was not read to the Court.

Direct Examination.

I am 38 years old. I live at Knappton, Washington. I am in the lumber business, connected with the Knappton Mills & Lumber Company, in the position of Superintendent. I have occupied that position about 11 years. I have been in the lumber business since I was big enough to walk around, say twenty years, anyway. I remember the coming to our dock at Knappton of a launchman, whose launch had brought a barge into the bay there. Assuming that was in November, 1917, I was there at that time. With reference to the barge, the launchman said that he didn't know what the barge was for. We did not know what the barge was for. He said he thought the barge was for airplane spruce. He was told that we had no airplane spruce. The barge was tied up alongside our log boom about 100 feet from the end of the loading dock. I learned what the barge was for a few days afterwards when the stevedores came over with a notice from the outfit to load the barge. They did

(Deposition of L. A. Mansur.)

not load it and it remained there, I should say, a week or more. I would not commit myself on that, but it was more than a week. I can identify this paper which you hand me, that is the notice that was handed in by the representative, I think his name was Davis. The card which is pinned to the letter itself, was, I believe, Mr. Davis' card.

Thereupon said letter, with said card attached, was marked "Defendant's Mansur Exhibit 1 for Identification," was attached to said deposition, and was in words and figures as follows:

Defendant's Mansur Exhibit No. 1 for Identification.

"San Francisco—California.

November Sixth—1917.

Knappton Mills & Lumber Company,

Agents—Douglas Fir Exploitation & Export
Co.,

Knappton—Washington. [171—104]

Dear Sirs:

Please deliver the under-mentioned lumber, in good order and condition, to Mr. Henry Rothschild or bearer:

1,300,000' of Douglas Fir purchased from you under contract dated November 2nd, 1916, and in accordance with specifications handed you in San Francisco under date September 19th, 1917.

Very truly yours,

COMYN, MACKALL & CO.,

Per J. CLAUDE DALY."

(Deposition of L. A. Mansur.)

WITNESS.—(Continuing.) I saw the barge after that. I could not give the measurements of the barge. I should say she had about probably five feet freeboard, and just roughly would estimate the barge to carry about 200,000 possibly 250,000 feet. She had no equipment on board. There was no donkey-engine. I did not see any tackle of any kind. I could not say the exact number of stevedores that were brought to the mill at that time, but perhaps there were six, including the boss. As to paraphernalia they had a few peaveys and two or three dolly rollers.

Thereupon the witness was shown Defendant's Griggs Exhibit 1 for Identification.

WITNESS.—(Continuing.) It would not have been possible to load on that barge specifications such as there shown at the rate of 60,000 feet per day. I have had experience in loading lumber vessels. I have been in the cargo business about eleven years. I have had experience in handling Australian specifications such as that which you show me. The business of our mill is both export and domestic. We have done cargo export business in former years perhaps 25%. I have been in the cargo export business about eleven years myself, while I have been there. The mill was in the cargo business for about fifty years. My duties with reference to the loading of vessels for export is that I am general superintendent. I see that everything is carried out right, that the ship fulfills her part of the agreement and that our men fulfill our

(Deposition of L. A. Mansur.)

[172—105] part. I have occasion to watch the loading of vessels. As to the instrumentalities used in loading a vessel, they have a donkey-engine and gear that lifts the lumber. They load the lumber in slings, throw a chain around it, and hoist it up and swing it on the ship. The donkey-engine generally belongs to the ship, and the lift cable. The peaveys and hooks, sling-hooks and that gear generally belongs to the stevedores. The tackle belongs to the ship. The mill does not furnish any of that paraphernalia. My opinion as to the amount of lumber that could be loaded on to a barge, or that particular barge, from the specifications shown, with the crew that was there, would probably be about fifteen or twenty thousand feet per day. The only way that could be done would be that the lumber would have to be put on rollers and shoved by hand or dragged by hand, and there is only one part of that specification that could be handled that way. The larger sizes would be very difficult to handle; it could be done, perhaps, but it would be very difficult. I should say that it could not have been handled with the crew that was there. The size pieces that I refer to are, I should say, from 16x16 51' to 66', up to 24x24 and 16 to 32. 24x24 means 24 inches square. The other is the length, 16 to 32. It is pretty hard to make an estimate, but, in my opinion, I would say that it would probably take six barges to carry that particular specification if they were of the same size as that one there. The question of giving dock space at our mill is an important one

(Deposition of L. A. Mansur.)

to the mill. We have plenty of dock space for ordinary use, but there never was a mill that had too much. It would take less time to clear the specification lumber from our mill if loaded on a ship with tackles than if loaded on to barges. You would have to figure out how much less time it would take. They agree to take at the rate of 60,000 a day, ordinary cargo is 60,000. I should say that the barge would not be able [173—106] to take more than fifteen to twenty thousand a day at the most. I think that if there were six or seven barges there, of a greater number of barges than one, about one barge could be used in the handling of the lumber each day at the same time. We could not very well handle more than one. Two could be handled; that would depend on the way that the lumber is put on the dock. When you put lumber on the dock for a sailing ship, it is placed on the dock for the operation of one gear only, that is for sailing ships. A sailing ship has only one gear. If we take a contract for a sailing ship we would expect to have one point of loading on the dock. It is the custom because the ship only has one gear.

I know the ship "W. H. Marston." I believe that she has not more than one gear. If delivered to the "Marston" or to a vessel with one gear, I believe that the lumber as prepared on the dock could not be handled with two barges with gear on each at the same time, but that there would have to be a rearrangement of the lumber. The space to be occupied by the use of two barges would be

(Deposition of L. A. Mansur.)

greater than the space occupied by a ship with one set of gears.

I know the meaning of "f. a. s. mill wharf." I have seen that term ever since I have been in the mill business. It is in the Pacific Inspection Book, it means "free alongside ship mill wharf." I never knew there was any particular difference between the expressions "f. a. s. mill wharf" and "f. o. b. mill wharf." I never thought there was any difference between "f. o. b. mill wharf" and "f. o. b. mill wharf within reach of ship's tackle." I have always had to do with shipments by water. In my opinion, it would not be possible to load on barges from these specifications lumber to suit the capacity of the "W. H. Marston." As between taking delivery from the mill wharf by a ship and taking delivery from mill wharf by barges, the method of taking lumber on the ship by [174—107] ship tackle is the most advantageous to the mill because she has the gear to lift the lumber, and if the lumber is not already on the front of the dock it is brought in on trucks and is removed right off the trucks with the gear. It is an advantage in a lot of ways. There are other things. With heavy pieces, heavy sticks, good management would put the heavy sticks right to the front of the dock where the ship can put their chain around it and lift it and if it is back, you have to lift it by hand. If you have no tackle to lift it with you have to lift it by hand. It would be possible to rig up tackle on a barge to lift heavy sticks of that kind to the barge. If it were possible

(Deposition of L. A. Mansur.)

to do that, I don't believe that lumber could be removed from the dock as quickly by such tackle as by ship's tackle. It is absolutely impossible to know in advance of the loading of a vessel what her capacity is. Vessels vary in their ability to carry lumber. Some vessels vary in their cargoes. I would say that the size of the lumber has a great deal to do with it on account of the stowing in the hold, and then the climatic conditions have a whole lot to do, the rain falling, the lumber is soaked with rainwater and it is heavier. If it has snow on it, snow and water, it is heavier, and she don't carry so much. The question of stowage has something to do with the varying of the cargo capacity of a vessel.

Q. Would it be possible, in loading to barges specifications there before you, to know how much of the laths and pickets would be used in the stowage of the named vessel to suit her capacity?

A. You could not tell about that; impossible.

Cross-examination.

WITNESS.—(Continuing.) I don't know that we refused to deliver lumber to any barge at all. I don't know that we did particularly. The "Marston" was never at our dock that I know of. She was [175—108] not there between December 1st and 31st, 1917. We would not have delivered to any barge. We would not deliver to the barge. We would not have delivered to any other ship than the "Marston." If any other ship than the "Marston" had been there, we would not have delivered it. I

(Deposition of L. A. Mansur.)

don't believe it is possible to put 60,000 feet of lumber a day on a barge. It could be done with the proper equipment. I think it is possible for a barge to be rigged up like a steam schooner. Anything is possible. I was never on board the "Marston." I have seen her at a distance, but never was on her. The first that I knew that this launchman who had come to us and asked for some lumber was connected with the Comyn, Mackall Company was when the demand was presented some days later by the stevedores. I didn't know who this launchman represented when he first came. Sometimes towboats leave barges at our dock for an hour or two, or sometimes for a day and sometimes for a week. It is always customary to come and ask permission, which we generally grant. This man brought the barge and came along close to the dock and wanted to know where he was to fetch the barge, and we knew nothing of the barge, knew nothing of what it was for, neither did he. He said he thought the barge came there for some airplane stock. We had no airplane stock. And he had orders to put the barge alongside the boom, which he did. It was the launchman who brought the barge. Two or three days, I think, after that the stevedores came. It might be longer; I would not be sure of that. When they came they presented this written letter which has been offered in evidence here. I knew that referred to 1,300,000 feet of Douglas fir in dispute in this case. So far as I remember, I told the stevedores we had no lumber for Comyn's at all.

(Deposition of L. A. Mansur.)

Mr. McCLANAHAN.—If you had received orders from the Douglas Fir to deliver a million three hundred thousand feet to any other [176—109] vessel, would you have done it? A. Yes, sir.

WITNESS.—(Continuing.) We would have done anything that the Douglas Fir told us to. We were acting under their instructions. I cannot recollect just what orders were given us in regard to Comyn, Mackall Company. My best recollection is that the only orders would have to be to deliver the lumber to the “W. H. Marston.” If the “W. H. Marston” had come in we would have delivered the lumber to her. Those were my orders. I could not say whether or not my orders were also not to deliver to any other vessel than the “W. H. Marston.” There was not anything stated definitely not to, but we would not, that was not in the contract. I am familiar with the ordinary contracts. I was not personally familiar with this contract in November, 1917. I was acting at that time strictly under the orders of the Douglas Fir Exploitation and Export Company, and our own judgment. We have been in this business a long time. I had not seen this contract. We were acting under the direction of the Douglas Fir Exploitation & Export Company. I cannot say exactly what their direction was, our correspondence was that we were to deliver cargo to the “W. H. Marston,” that is the direction. It is the only direction that I can recollect.

Redirect Examination.

I am not in the office department of our mill a

(Testimony of L. A. Mansur.)

great deal. I am there part of the time, but my principal business is outside, all over the place. The office books are kept by some one else. A lot of things might transpire through the office without my seeing it, but anything of importance comes to my notice.

Recross-examination.

I didn't say that nothing came to my notice with regard to this matter. Nothing did come to my particular notice in regard to this shipment. [177—110]

Testimony of A. A. Baxter, for Defendant.

A. A. BAXTER was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination.

My name is A. A. Baxter. My home is in Oakland, and my business is in San Francisco. I am the general manager of the Douglas Fir Exploitation & Export Company, the defendant in this case, and have been ever since its organization, or rather since it commenced actual business. It commenced actual business November 1, 1916. The general business of this defendant is the selling of lumber for export only. Lumber manufacturers, manufacturers of fir lumber in the States of Oregon and Washington, are, in general, the members of the Association. There are none in California. The plants are in Oregon and Washington. Some of the headquarters of the owners are in California.

(Testimony of A. A. Baxter.)

Only the manufacturers are the stockholders of the corporation. This contract, prior to October 11, 1916, was drawn by me. During all of October, 1916, and for seven years prior to that time, I was the manager of The Charles Nelson Company. They were owners of two large mills, and these two large mills, it was known, were going into this combine, and I was slated to be manager of the combine. About October 11 it was known that the combine would be accomplished. There was then a rush of the exporting merchants to cover these cargoes that they had already sold, and the commitments they had already made, because they anticipated the combine would immediately put up the prices. Several of them asked me over the telephone what we proposed to do. Then Mr. Comyn came to me about these four cargoes. I told him we would take care of them. He said he had committed himself, or had sold them at a \$10 base. I told him we would take care of him at that price. I had no authority to sign or to make a contract in the name of the new company; I made the contract with him in the name of the old company at a \$10 base. The new company actually [178—111] started business on November 1, 1916. Other merchants sent in their cargoes, and they all reported them sold at \$9.50 base, and we were taking care of them at the price they had been sold at, before we put up our price. At that time I told Mr. Comyn that we had taken all the others on at \$9.50, and I did not think it would be fair to take his at \$10, and for that reason

(Testimony of A. A. Baxter.)

we cancelled that entirely and substituted the new contract at \$9.50. The new contract is dated November 2d. The first contract was the contract with the Charles Nelson Company. At that time that company had nothing to do with the Douglas Fir Company, so that really the Douglas Fir Company took over the obligation of the Charles Nelson Company with respect to those four cargoes, and put them in at a price of \$9.50 instead of \$10, half a dollar lower than the original price at which the contract was made, so as to put Mr. Comyn on the same basis with all the others. Prior to November 2d, Comyn, Mackall Co. were not approached to go into this combine. They had nothing to do with it. They were not at any time in the category of manufacturers. I wrote this contract myself. The "G" List referred to in the contract is a schedule that provides for the conditions of the sale, and the prices that vary accordingly as the lumber becomes more valuable or less valuable than the base price.

Mr. McCLANAHAN.—Q. What is the base price which we have been talking about in this case, the base price of \$9.50?

A. The list is printed at a \$20 base.

WITNESS.—(Continuing.) I am speaking of the present list. The "G" list is printed at a \$20 base. When it says \$9.50 base, it means a discount of \$11.50 on everything in the printed list. If it were a \$20 base, it would mean just the printed list. If it were a \$30 base, it would mean \$10 above the printed list. Taking the \$9.50 base, you would figure

(Testimony of A. A. Baxter.)

a cargo of fir under Australian [179—112] specifications by taking \$9.50 as the base and add to it the differentials, whatever there was over \$20 in the printed list, or deduct from it for anything there was below \$20, in the same proportion. I do not mean to say that the deductions for all would be the same, and that the increase for all would be the same. The list is printed relatively, to show the relative values of everything that is listed in the list, everything that is printed in the list.

The COURT.—Q. Let me see if I understand. Here are 1 by 3's, that are listed at \$25, \$27.50, \$29.50 and \$30.50; that is on a \$20 base, as I understand you?

A. Yes. This is \$5 above, that is \$7.50 above, that is \$9.50 above, and so on.

Q. That is, if you take a \$9.50 base?

A. Then it would be \$9.50 plus 5.

WITNESS.—(Continuing.) It is possible that under the specifications in this case there is a different price attaching above the \$9.50 "G" base to each of the kinds, conditions and sizes of the lumber. There may be instances where there is a deduction from the base price; if there is anything printed there below \$20, that would be the case, but I think \$20 is the lowest printed price in the list. The "G" list is a price and condition schedule used by exporters of lumber. It applies to exporting lumber. The export lumber is the kind that I deal in. I have been in the lumber business about thirty-seven years, all on this coast; in British Columbia, Wash-

(Testimony of A. A. Baxter.)

ington and California, the last 29 years in San Francisco. I have been connected with the export lumber business for 29 years. I am familiar with the trade terms used in contract for export lumber. The term "F. A. S." is a familiar one to me. The initials "a. s. t." mean, in such a contract, at ship's tackle. The term "15% more or less to suit capacity of [180—113] vessel" is a familiar one to me. That term is used very often in contracts for exporting lumber. The meaning known to the trade here of the letters "f. a. s." in an exporting cargo contract to a named vessel, is free alongside within reach of ship's tackles. The expression necessarily conveys the idea of the presence of the ship. The meaning of f. o. b. mill wharf within reach of ship's tackle is the same thing. There is practically no difference between the expression "f. a. s. mill wharf within reach of ship's tackle" and "f. o. b. mill wharf within reach of ship's tackle," but "f. o. b." is not customarily used in the cargo trade, but it is occasionally used. "F. a. s." is a customary water phrase. In contracts for cargo lots, where there is a named vessel, and where there is the expression used "f. a. s. mill wharf within reach of ship's tackles," there is a custom known to the trade on this coast that requires the presence of the vessel at the mill wharf. That custom as been known to me as far back as I can remember. During my whole business life of 29 years in the cargo business, it has been known to me. It was known to me in November, 1916. That custom is generally recog-

(Testimony of A. A. Baxter.)

nized along this coast by the export shippers, and it was so recognized in November, 1916. In contracts for cargo lots to named carrying vessels, where the expression used is "15% more or less to suit capacity of the vessel," there is a custom which existed in November, 1916, that required the actual loading of that vessel before it was possible to know the amount sold under the contract. That custom was well known on the coast. That custom means to give the vessel a full cargo. The 15% is an estimate that her capacity will be within that 15%, but if that estimate were not used at all it would mean the same thing, a full and complete cargo for the vessel. Where there is a cargo sale to a named vessel, and it contains the expression "15% more or less to suit the capacity of the vessel," in addition to an estimated number of feet, it is the custom to load the vessel. [181—114] That determination cannot be arrived at before the vessel is loaded. I would say that it is not possible to load on to barges the amount of lumber sold as the capacity of a named ship, unless you know what the ship's capacity is. A ship's capacity does not always remain the same, the loading capacity changes on the same ship. A ship changes its loading capacity when it loads the same commodity, such as lumber. The reason for that is because of the different seasons of the year; she will load probably three or four per cent more in summer than she will in winter. There is another reason; some lumber is heavier than other, what I mean by that

(Testimony of A. A. Baxter.)

is that some is a close-grained, heavy lumber, the logs of which float deep in the water, because they come from the butt of the tree; others come from the top of the tree and will float much higher out of the water. If cargo is cut largely from those light logs the vessel will carry more, if it is cut largely from the butt logs she will carry less, even in the same month of loading. The height of the deckload affects the question of her carrying capacity, and in a schooner of this type, or a vessel of this type such as the "Marston," the height of the deckload affects the question of her carrying capacity very materially. The captain, plus the marine surveyor, has control over the loading of a cargo to a ship's capacity. If there is a difference of opinion the captain can say "I am loaded" and the marine surveyor cannot compel him to take more, but the captain can ask for more and the marine surveyor can deny him more; that refers to the height of the deckload.

This is a contract for a named vessel. There are benefits accruing to the seller of lumber under a contract such as the one in suit, where a vessel is named, and where it is for a cargo to suit the capacity of that vessel, and where there is a delivery date extending over a period of ninety days. Those benefits are [182—115] several in number. First, and in this case, that it would assure us that the cargo was to be exported; second, it would permit us, through the shipping papers, to keep track of the vessel's movements and know approximately when

(Testimony of A. A. Baxter.)

she would arrive. Third, the vessel being named would give us some idea of the cargo required, the quantity of cargo required, and that would be particularly so had the vessel loaded cargoes of lumber before. The naming of the vessel would also decrease the buyer's opportunity to speculate on the 15 per cent more if the price went up, or 15 per cent less if the price went down. The trade papers I have spoken of are shipping papers. They give the position of the vessel on any given day, how many days she is out from one port to another port, or that she is in such a port. Contracts of this character, where the delivery date extends over a period of 90 days, give us the means of knowing in advance when the mill will be called upon to cut the lumber, and we instruct the mill. The mill does not keep track of it. It gives us that advantage. We did not commence to cut this lumber in accordance with the specifications on the 1st day of October because the position of the vessel was such that we did not think she would make her loading date. When we got the specifications from the plaintiff, we had no knowledge as to when we would be required to cut that lumber, but we thought if she arrived at all it would be very late in December. We had no knowledge as to when the boat would arrive; we thought at that time that the vessel would not arrive, but we did know that plaintiff had furnished us with specifications and asked us to cut the lumber. When they furnish you with the specifications, that is equivalent to asking you

(Testimony of A. A. Baxter.)

to cut the lumber at a particular time, that is your authority to go ahead and cut the lumber, but they have no discretion as to what date we shall commence, that is up to us. When these specifications were handed to me on September [183—116] 19th, I knew exactly where the "W. H. Marston" was. I knew where the papers reported her to be, so many days out from the Columbia River, bound for Melbourne. That is reliable information and is so considered by the shipping trade. After September 19th there came a time when I knew that the "W. H. Marston" could not make her loading date. When I say "I knew," I knew it became a practical impossibility. When I had knowledge that it had become practically impossible, I still had time to cut the lumber and have it ready to load the vessel should she reach the mill dock by December 31, because the contract gave us the option to deliver f. a. s. mill wharf within reach of ship's tackles, and also on barge alongside of the vessel at the mill wharf. Therefore, we could draw it from two or three, or, if necessary, more mills, if she arrived at a later date. I had the power to have this lumber cut by more mills than one. We were not obligated and tied to the Knappton Mills & Lumber Co. We could have assigned a part of it—had the vessel been dropping in on us and had we been facing demurrage, we could and would have assigned part of it to other mills. We could have loaded in this optional way from the mill dock and from barges also. That would have expedited the loading. The pur-

(Testimony of A. A. Baxter.)

pose of putting that optional method in our contract of loading a vessel is that the men want us to take care of certain of our mills where they have not deep water at the wharf, or where they have no wharves at all. That is the main object, but in addition to that it enables us to get out, when we get caught by a vessel arriving earlier than we anticipated, then we can bring lumber from two or three other mills and deliver it alongside on a barge. I know of my own knowledge the thing that made it practically impossible for the "W. H. Marston" to make December loading date. This was permitting the vessel to change from returning in ballast to returning in cargo. I knew that she was on the way in a cargo of lumber from Astoria to Melbourne. I knew that she was to return [184—117] after that in ballast to the Columbia River to load our cargo. The charter provision was changed to permit her to return in cargo. That is not all I know about it. I was approached by Mr. Comyn, on the floor of the Merchants Exchange, to extend the date of loading that vessel. He told me they could get some considerable amount for extending the time, he thought about \$5,000, and intimated that some portion of that could be given to me, that is, to the Douglas Fir Company; I had no intention of intimating that it was intended as a bribe. He told me that he was offered something for the privilege of coming back in cargo. At that time they spoke of coming back via the South Sea Islands, in copra—no, bringing copra back as part of the cargo,

(Testimony of A. A. Baxter.)

but I am not sure that it was via the South Sea Islands, because the copra might have been taken over in small vessels, but it was to bring the vessel back in cargo. It might be copra, or it might be wheat. I objected to it. I don't remember the date of that conversation. Mr. Daly, then associated as the manager, I think, of the Australian Department of Comyn & Mackall, came to my office and offered me \$2,500. When I say "offered me," I mean to the company. Offered to the company \$2,500 to extend the loading date so as to take that vessel when she arrived, telling me that they had got \$5,000 from the owner of the vessel for permitting him to change that clause in the charter-party that required the vessel to return in ballast, and now permitting her to return in cargo. I declined it. I said to him then, that as they had taken this consideration, changing the charter-party, they put themselves in the same position that the ship was; in other words, they were speculating; if she arrived in December, even on the last day of December, we would commence to load her at \$9.50; if she arrived at a later date we would still be glad to load her, but at our then price for January, February, March, as we did not anticipate she would be later than March. My recollection [185—118] now is that that price was \$22.50 base. That was the end of the conversation. I cannot fix the date when I learned that it was practically impossible for this vessel to make her loading date, but it was when I learned that her charter-party had been changed so as to permit her

(Testimony of A. A. Baxter.)

to return in cargo. She had to load cargo at one end and discharge it at the other. The "William Bowden" was one of the unnamed, or one of the to-be-named vessels in the contract. The "Golden Shore" was one of the to-be-named vessels in the contract. I required of Comyn & Mackall an addition over the agreed \$9.50 base for the "William Bowden's" cargo, because I had sold him two cargoes for vessels that were named, and 1,450,000, 15 per cent more or less, for two vessels unnamed, that was the combined capacity of the two vessels to be named. When he named the two vessels, their capacity was greater than 1,450,000 plus 15 per cent, and it was therefore mutually agreed that he should pay us our then current price for the excess above 1450 M plus the 15%. If the "William Bowden" and the "Golden Shore" had been named in the contract, and their estimated cargo had been fixed at 1450 M feet combined, I would not have demanded the current rate of the combined cargoes then exceeding 15% because the vessels having been named in the contract I would feel under an obligation to give them a full cargo and consider the contract filled, regardless of whether it exceeded or was below the amount estimated, even if it exceeded the 15%. [186—119]

Testimony of A. G. Harms, for Defendant.

A. G. HARMS was called as a witness on behalf of the defendant, and being first duly sworn testified as follows:

Direct Examination.

I reside in San Francisco. My present occupation

(Testimony of A. G. Harms.)

is that of vice-president of Pope & Talbot, a corporation. I have been vice-president of that company for about a year and a half. My position with them before that time was Secretary for a good many years prior to that. Pope & Talbot's business is principally lumber and shipping. I believe that they advertise that they have carried on that business since 1853. We have mills situated on Puget Sound in the State of Washington, at Port Gamble and Port Ludlow. We manufacture approximately 100,000,000 feet a year. Our Company is also engaged in chartering vessels and in the shipping business. I have been personally familiar with the lumber and shipping business of Pope & Talbot during my career as secretary and as vice-president of that corporation.

The trade term "f. a. s." is generally understood to mean free alongside vessel, within reach of ship's tackles. Where a contract is made for the sale of lumber to be carried by a named vessel, with a definite period of loading fixed, there is a custom with regard to the requirement or nonrequirement of the presence of the named vessel at the loading port during the agreed loading period. It is understood that the vessel must be there within the time specified in the contract. That is absolutely a general custom of the trade. There is no custom of the trade by which the buyer can present his vessel at a time after the loading period unless the contract is modified. I never heard of any such custom unless it is mutually agreed upon. There is no custom

(Testimony of A. G. Harms.)

permitting the delivery of lumber within the agreed loading period to barges, instead of to the named vessel. I never heard of lumber being delivered to barges instead of to the named vessel under [187—120] such contracts. My testimony in regard to this custom applies to the end of the year 1916 as well as to the present time. The custom with regard to cutting the lumber for the named sailing vessel in such a contract is that the mill agreeing to furnish the order follows the position of the vessel and regulates the commencement of the preparation of the cargo according to the position of the vessel. In the case of the sale of a cargo of, say, 1,300,000 feet of lumber for export shipment, 15 per cent more or less to suit the capacity of the vessel, the amount of the sale is not determined, that is, the exact amount is never determined until the vessel has completed her loading. That is the custom.

Cross-examination.

One of the heads of Pope & Talbot, besides myself, is Mr. W. H. Talbot, who is the president. Mr. Talbot is an officer of the Douglas Fir Exploitation & Export Company. He is president of that company, too. He is president both for the concern that I work for and of the defendant here. I recall that in the fall of 1916 the Douglas Fir Exploitation & Export Company became active in operation. Prior to the month of October, 1916, it was not the custom of the lumber trade here to load sailing vessels that had been named for cargoes

(Testimony of A. G. Harms.)

and arrived late unless it was mutually agreed. It was not the custom to load them late unless the contract had been modified to that extent. I am pretty familiar with the transactions of Pope & Talbot in the first nine months of 1916 and for the years prior thereto. I cannot recall any specific case prior to October, 1916, in which Pope & Talbot Mills, as an accommodation to a buyer and without any further consideration from the buyer, agreed to or did load a sailing vessel after her loading date. I cannot recall either any specific case where they refused to load a sailing vessel which could not make her loading date with a cargo that had been specified for that sailing vessel. [188—121] I cannot recall any such particular instance. It would be an approximation, but I should say that in the year 1915 Pope & Talbot shipped between 40,000,000 and 50,000,000 feet of lumber that was exported. The average cargo would vary. Some of them carry a little less than a million feet, and some probably two million feet. I cannot name any specific case right now, during the entire period of my connection with Pope & Talbot, in which they refused to load a sailing vessel that arrived late without a special agreement to that effect. I would say that the percentage of sailing vessels which failed to make their loading date is very small. I would not even approximate what it is. It does not happen often. It happens very seldom. It is a little more difficult to approximate the arrival of a sailing vessel a year in advance at a given load-

(Testimony of A. G. Harms.)

ing port than it would be if it were within six months. It is a matter that depends on weather conditions. Six months would be a reasonable period to approximate the arrival of a vessel. If we had six months in advance we could tell within ninety days of the date a vessel would make her loading date. If it were nine months in advance, it would be just a little more difficult, and if it were 12 months in advance it would be still more difficult, and 15 months in advance would be still more difficult.

Q. Would you say that the average shipping man can with any degree of certainty tell whether or not a vessel will make a loading date 15 months ahead?

A. It has been our experience and our judgment never to attempt to estimate that so far ahead. We know that they were doing it, but we were not even attempting it.

WITNESS.—(Continuing.) We did not attempt it because we consider it in the nature of speculative business, and we did not indulge in speculative business. We would not name a vessel 15 months [189—122] ahead because it is a matter of speculation. It is selling in advance of the market too far. You could not name a vessel and know with any degree of certainty that she was going to arrive at a certain date, say 15 months ahead. I don't think it could be done with any degree of certainty, even though you had a leeway, say, of three months; you ought to be able to approximate it but there would be no certainty. She might arrive earlier

(Testimony of A. G. Harms.)

or she might arrive later than the three months. You could not tell 15 months in advance whether a sailing vessel would arrive within a period of ninety days.

Redirect Examination.

If a vessel were fixed under different charter-parties over the periods in question, it would give you something to work upon that would be a little more specific and definite. [190—123]

Testimony of W. C. Ball, for Defendant.

W. C. BALL was called as a witness on behalf of the defendant, and being first duly sworn testified as follows:

Direct Examination.

I reside in Oakland, California. My present occupation is sales manager of Charles R. McCormick & Co. I have held that position for approximately six years. The business of Charles R. McCormick & Co. is wholesale lumber and shipping. I believe that they have been engaged in that business about 13 or 14 years. I am familiar with both the lumber and the shipping ends of that business.

The meaning of the trade term "f. a. s." is free alongside; free alongside vessels, or according to the terms of the contract, whatever it said. The Charles R. McCormick Co. operate three mills, all of them situated at St. Helens, Oregon. With regard to the approximate amount of business that these mills do each year, they are at the present time cutting 650,000 feet a day; it varies according

(Testimony of W. C. Ball.)

to the amount of business, and how many ships we operate. It would be, approximately, 200,000,000 feet a year. In the case of a sale of export lumber to be carried by a named vessel within a definite loading period fixed by the contract, there is a custom in regard to requiring the named vessel to be present within the loading period; that is that the vessel named load the material under the contract within the time specified. That is a general custom of the trade. There is no custom of the trade respecting permitting that vessel to take her cargo if she arrives after the loading period has expired. I never heard of any such custom. There is no custom permitting barges to take such cargoes in place of the named vessel within the loading period. In case of a sale of a cargo of lumber of, say, 1,300,000 feet, 15% more or less to suit the capacity of the vessel, the amount of lumber sold is determined, I would say, after the vessel [191—124] has been loaded. That is the custom of the trade so far as I understand it.

Cross-examination.

The percentage of our business which is domestic and the percentage which is export depends entirely on the demand. We have at times as high, probably, as 20 per cent, and sometimes not 5 per cent. I could not say right offhand, without looking up the record how much export business we were doing in 1916. We were doing a fair amount. We did considerable export business before the organization of the Douglas Fir Exploitation & Ex-

(Testimony of W. C. Ball.)

port Company. We did this business from the time that the St. Helens Mill was first put into operation. I would not be able to say without looking up the records how much export business we did in the year 1915, but we have done considerable. We handled a good many export cargoes, and handled a good many contracts where the vessel was named. I believe that we have handled cases where the vessel was not named in the origin of the contract. I have known of cases where the vessel was named before.

Q. You say that where a sailing vessel did not make the loading date, and I am talking now of the period prior to the organization of the Douglas Fir,—do you remember when that was? I will give you the date. It commenced operating about October or November, 1916. Now, prior to that date you say it was the custom that if a sailing vessel could not make her loading date she would not be loaded?

A. I don't remember answering the question exactly in those words.

WITNESS.—(Continuing.) With regard to whether or not it was the custom not to load a sailing vessel that could not make her loading date without some special compensation or special consideration from the buyer to the seller, I would say that each individual case [192—125] is governed by arrangements made between the buyer and the seller. I haven't any recollection of being a party to instances where, without any further modification of the contract than an extension of the time, a

(Testimony of W. C. Ball.)

mill would extend the loading date for a sailing vessel that could not make the loading date. I have no recollection of such a thing ever happening in any business that I had anything to do with. In my experience, I do not know of any instance where a mill refused to extend the loading date for a vessel that was late. With regard to this custom, I am speaking just from my own experience. I do not know of a case where a late sailing vessel's loading time or loading date was extended. I do not know of any case where a mill refused to extend it. Our mills are in the Douglas Fir Exploitation & Export Company. Our vice-president is a director or trustee of the defendant here. With regard to whether or not I am interested in the outcome of this controversy, I personally did not know of it until I was called upon. Now that I do know about it, I am not interested in the outcome. It is immaterial to me which side prevails. It is immaterial to me whether the Douglas Fir, of which we are a member, or their opponents, Comyn & Mackall, prevail. Whatever interest our firm has in the Douglas Fir Exploitation & Export Company is financial. I am not familiar with what their interest is. Whatever it is, I am not familiar with their contract.

Redirect Examination.

My testimony with regard to the customs I have testified to applies equally to the year 1916 as well as to the present time. With regard to whether it applies to domestic shipments as well as to export

(Testimony of W. C. Ball.)

shipments, I can't recollect each and every question asked me.

Q. I mean the custom in regard to the named vessel is the same with reference to domestic shipments as it is with reference [193—126] to export shipments, if a vessel is named?

A. If a vessel is named you are supposed to load your lumber on the vessel named.

The COURT.—Q. As you understand it, was there a custom in 1916 by which, where there was a named vessel, the buyer would be relieved from making delivery if another vessel was tendered?

A. The custom, as I understand it, was that when a vessel was named to load a cargo within a certain time, that that cargo must be loaded on that vessel unless there was some other agreement made between the buyer and the seller.

Q. And if the vessel, itself, was not presented within the loading date, the buyer would be relieved from the responsibility; is that the idea?

A. That is my understanding.

Mr. DERBY.—Excuse me, your Honor, didn't your Honor mean the seller?

The COURT.—Yes, I mean the seller.

Q. The seller would be relieved from liability under the contract?

A. If the vessel did not arrive within the time.

Mr. SUTRO.—Q. Mr. Ball, suppose the vessel was lost.

A. From what little I know of it, that would be a legal matter, as to whether or not the buyer could

(Testimony of W. C. Ball.)

comply with his contract; if the vessel was lost, it would be impossible to deliver the vessel there then.

WITNESS.—(Continuing.) If it were impossible to furnish the vessel within the time specified for her loading date and if that cargo had been cut, my understanding of the custom in 1916 is that if the vessel did not arrive because of conditions beyond the control of the buyer, within the time specified, there would [194—127] be some mutual understanding regarding that cargo. There was no custom on the subject if it was beyond the control of the buyer. [195—128]

Testimony of John B. Blair, for Defendant.

JOHN B. BLAIR was called as a witness on behalf of defendant, and being first duly sworn, testified as follows:

I am general manager of J. J. Moore & Co., a corporation. The company is in the business of exporters and importers. They have been engaged in the export business about thirty years. They export lumber. They are also charterers of ships. They own ships. I have been connected with J. J. Moore & Co. for twenty years, and am now the general manager. I am familiar with the trade terms that are used in export contracts of lumber. "F. a. s." would be such a term. In a contract for the sale of a cargo of lumber for export on a named vessel, "f. a. s." in such a contract means free alongside the named vessel. I do not know whether there is a custom known to the trade relative to the

(Testimony of John B. Blair.)

method and the time of ascertaining the amount of the cargo sold. In contracts such as you have spoken of, I think the amount carried by the vessel would determine the amount of the contract. That determination is made after she is loaded. I believe that is the custom. That is the custom, so far as I have dealt on this coast in such contracts. My dealings have been along this coast for twenty years. I remember the charter by J. J. Moore & Co. for the sailing vessel or schooner "W. H. Marston." That was in my time. I recognize the document you show me as being the charter of the "Marston," and that charter calls for a voyage from the Columbia or Willamette Rivers, or on Puget Sound to Sydney or Melbourne, wharf, or Port Adelaide, or Newcastle, New South Wales. The date of the charter is April 11, 1916. Thence to the usual safe landing place on the Willamette or Columbia Rivers, or on Puget Sound, I mean to load at those ports to Australia. That is the voyage which this charter covers, and only that. We do not have a subsequent charter of the "Marston." We had a previous charter. Prior to entering into this charter it was stipulated that the "Marston" would proceed to Puget Sound and load under this charter. [196—129] I do not remember the exact date at which that charter was assigned to Comyn, Mackall & Co., but it was while she was on the voyage previous to this, carrying a cargo of lumber to Australia. The voyage that was assigned under that charter-party to Comyn, Mackall & Co. was assigned after her

(Testimony of John B. Blair.)

return from Australia in ballast, and she was then to load lumber at Columbia or Willamette Rivers, or Puget Sound, to Australia. J. J. Moore & Co. as charterer owned the chartered vessel on return from the Australian port to this coast in ballast. When we rechartered her, I do not remember the exact date, this whole charter was then endorsed by me over to Comyn, Mackall & Co., and all rights thereunder transferred to them. I do not remember the date. Upon the return of the vessel from the port at Melbourne to the Columbia River, she came back carrying a cargo, and the charter-party provided that she should come back in ballast. I remember the transaction that resulted in the vessel carrying the cargo back instead of coming back in ballast. The owner of the vessel was desirous of bringing a cargo of wheat from Melbourne to this coast. That owner was Mr. Harry Pennell of Portland, and he wrote me that inasmuch as the charter provided that she must return in ballast he must have the charterer's permission before he could deviate from this charter. Knowing that the vessel had been rechartered by me in the meantime, he asked me if I would get such permission. He wrote that it might cost him something, and would I commence negotiations and see what the cost of arranging for a wheat cargo would be. I then passed letters with him, which I communicated to Comyn, Mackall & Co., and the privilege of loading wheat was finally given the owner on the payment of a certain sum, \$5,000 I think it was. I don't remem-

(Testimony of John B. Blair.)

ber what that date was. I don't remember the date of the change in the charter. That is all covered by correspondence in my office. I never offered the Douglas Fir Exploitation & Export Company, the defendant in this [197—130] case, the sum of \$2,500 for J. J. Moore & Co., or any other sum, for the privilege of extending the "W. H. Marston" loading date under a contract which Comyn, Mackall & Co. had at the time with the Douglas Fir Exploitation & Export Company. I never had any negotiations with the Douglas Fir & Exploitation Company on my own behalf or on behalf of J. J. Moore & Co., or on behalf of Comyn, Mackall & Co., with reference to the extension of the loading date of the "W. H. Marston" under the contract mentioned. Mr. J. Claude Daly is in our employ now. He is the gentleman who at one time was in the employ of Comyn, Mackall & Co. He left their office to come to ours after he had resigned from Comyn, Mackall.

Cross-examination.

The amount of cargo carried by a named vessel will determine the amount due under the contract.

Mr. SUTRO.—Q. I will state the question over again, so there will be no doubt about it. If there is a cargo of lumber bought, which names a vessel, specifies the quantity, and 15% more or less, and says, "To suit capacity of vessel," and the quantity was, say, a million feet specified, and the vessel's name, and the clause in the contract, "15% more or less to suit the capacity of the vessel," and that the

(Testimony of John B. Blair.)

capacity of the vessel is 50% more than a million feet, what do you understand from the custom is the obligation of the seller with respect to delivering the excess amount of lumber?

A. I cannot conceive of a contract for a named vessel and likewise a specific quantity at the same time.

Q. Now, if I understand you, Mr. Blair, when you have a specific quantity, 15% more or less, you ordinarily don't have the name of the vessel: Is that correct?

A. If the purchase is for a million feet, 15% more or less, and the vessel is named afterwards, and the vessel is subject to a million feet, 15% more or less—

Q. (Intg.) The vessel in such a case as that becomes an incident, doesn't it, and the quantity becomes the controlling factor: Isn't that so?

A. Yes.

Redirect Examination.

The purpose of placing in an f. a. s. contract, where the vessel is named, and where there is inserted this million feet 15% more or less to suit the capacity of the vessel, of putting in a million feet, is that if the contract is first for the named vessel, the quantity stated is explanatory. It gives the mill the range the [198—131] vessel will come in, 15% less than the quantity, or 15% more. I have never heard of a case where the range or limitation of 15% is exceeded in the actual loading of the vessel where the vessel is named, and then the

(Testimony of John B. Blair.)

explanatory amount of 15% more or less is exceeded, without making a new contract on the excess.

Mr. McCLANAHAN.—Q. I mean when the parties get together and make their contract for a cargo, for a named vessel, and they put in there, a million feet, 15% more or less, have you ever heard of a case where in the loading of the vessel the actual loading exceeded the 15% more than the million feet?

A. I don't quite understand you. You say where a named vessel—

The COURT.—Q. And where the quantity of lumber is stated and then there is a range of 15%, counsel wants to know whether you ever knew of a case where the excess exceeded the 15%?

A. Yes, we have had vessels where they ran over the 15%.

WITNESS.—(Continuing.) The purpose of putting into a contract for the named vessel the 1,000,000 feet 15% more or less to suit the capacity of the vessel, is so the mill may know how much lumber they are called upon to furnish. Under such a contract the sale is for a definite number of feet that the vessel will carry within the limits of the 15% more or less. That is in contracts which call for a cargo for a named vessel. It is the mill which, in making an f. a. s. cargo contract for a named vessel, inserts in the contract the definite number of feet with the limitation. In sales for a definite number of feet of lumber, and without any reference to whether it is a cargo or not, as a custom we insert in the contract 15% more or less. This is on a defi-

(Testimony of John B. Blair.)

nite number of feet and without any reference to a cargo. We do that because on a stated amount you might determine that you might want to take advantage of a greater quantity than a vessel carries. In a contract for the sale of a [199—132] definite number of feet of lumber, and without any reference to any ship, it is necessary to put in that contract 1,300,000 feet, 15% more or less. The 15% more or less is put in because you may not be able to get vessels.

**Testimony of A. A. Baxter, for Defendant
(Recalled).**

A. A. BAXTER was recalled as a witness on behalf of the defendant, and having been previously duly sworn, testified as follows:

The "Bowden" was not furnished with a cargo, because she did not arrive at the mill within the loading date provided for in the contract. The "Marston" was not furnished with a cargo for the same reason. Between the dates of October 1st and December 31st, 1917, it was at no time possible for the defendant to tender to the schooner "W. H. Marston" a cargo at the mill wharf free alongside that vessel, or free on board the mill wharf within reach of that vessel's tackles, or on barges at that vessel's tackles at said mill wharf. In f. a. s. cargo contracts there is inserted a definite number of feet with the expression 15% more or less to suit capacity of vessel, to allow a leeway that is estimated sufficient to load the vessel that may later be named. The estimate is determined by the parties as a mutual

(Testimony of A. A. Baxter.)

agreement between buyer and seller. With regard to where they obtain the information as to the estimate, I think it is entirely speculation. For instance, a buyer might look over the shipping papers and see that there are twenty-five vessels inward bound. Their tonnage is such as to indicate that a cargo of 2,000,000 feet would suit the capacity of those vessels nearer than either a larger cargo or a smaller cargo. They would be very apt to decide on 2,000,000 feet. If there was more tonnage apparently available for the time of loading required of, say, 1,000,000 feet, they would be more likely to arrive at 1,000,000 feet. They gain this information from trade journals. But in selling the cargo, and I speak now for myself, I would sell it either a million or a [200—133] million and a half, or two million, or three million, if he wanted it at any particular time. We would meet their requirements. The naming of the definite number of feet is an approximation of the cargo that the parties make themselves. I do not know of a custom with reference to contracts, where delivery is to be made to barges, of inserting "15% more or less." In an f. a. s. contract "B. M." means board measure. The expression "15% more or less to suit the capacity of the vessel" means to give the vessel a full and complete cargo. I know how much cargo was loaded on the "W. H. Talbot," and I have the figures in my pocket—971,972 feet, board measure. That was the amount which was paid for under this contract. The contract was for 1,000,000 feet, 15% more or less to suit the capacity

(Testimony of A. A. Baxter.)

of the vessel. Delivery of lumber to a barge is not delivery to a ship for export lumber.

The COURT.—Q. Suppose the lumber was delivered on a barge and then taken right out and put aboard a ship for export, then it would be for export, wouldn't it?

A. Yes.

The COURT.—I thought you did not mean just exactly what you said. You asked him, Mr. McClanahan, if the delivery of lumber on a barge would be a delivery for export, and he simply answered "No."

Mr. McCLANAHAN.—If the Court please, I am asked a question that is provided by the evidence in here covered by the "G" list. The "G" list states on its face to be a price list of cargoes for Douglas Fir to be delivered to a ship for export shipment. My question relates to that entirely.

The COURT.—Ask him again, and let him answer it. Maybe I misunderstood him.

Mr. McCLANAHAN.—Q. Would delivery on a barge be a delivery to a ship for export shipment, as provided by "G" list?

A. No. [201—134]

Cross-examination.

It is customary in some small percentage of cases to load lumber on to barges for export. It is not customary to make contracts which provide for delivery to barges. I know of no contracts which provide that a given quantity of export lumber should be delivered to barges 15% more or less. I can ex-

(Testimony of A. A. Baxter.)

plain to the Court's entire satisfaction my testimony five minutes ago, where there is no custom with reference to delivery of lumber to barges 15% more or less, unless the lumber is to be exported. The questions were asked in such a way that one cannot answer either yes or no and fully explain the situation. Now, I will explain it. I am asked the question, first, do we make delivery on barges for export. I say no. We make a contract to deliver lumber for export free alongside the ship, within reach of her tackles, that is, within 70 feet of her, and at our option, on the wharf or on barge. The title to that lumber passes when the lumber goes into the ship's slings, whether it is from the wharf or from a barge. Now, if we put it on a barge we insure it; if it is lost before it goes into the ship's slings, the insurance company pays for it. They have a blanket policy. If it goes into the ship's slings, and the ship should be burned while she is half loaded, the buyer has it insured. As it goes in the ship's slings, the buyer's insurance takes effect and ours ceases. That will explain the situation. It has not passed us until it is in the ship's slings, it is our lumber.

The COURT.—Q. It is your lumber while it is on the barges?

A. It is our lumber while it is on the barge. And if the barge lying alongside the ship has discharged one-half of the bargeload, and the barge is swamped and lost, it is our lumber and our insurance protects it.

(Testimony of A. A. Baxter.)

Mr. SUTRO.—Q. You have testified here this afternoon to a great many customs; one of the customs you have testified to related [202—135] to the delivery of a specific quantity of lumber, 15% more or less, to barges. Now, Mr. Reporter, will you turn to page 322 of your notes and read the question and answer there. I want to get the exact words of the question and answer.

(Thereupon the record was read as follows:)

“Q. Is there a custom with reference to contracts where delivery is to be made to barges to insert ‘15% more or less’? Is there such a custom?

A. Not that I know of.”

Q. (Continuing.) You were asked was there a custom where delivery was made to barges to insert “15% more or less,” and you say there is no such custom.

A. I say no.

WITNESS.—(Continuing.) There is no custom to make contracts for delivery for a specific quantity of lumber to barges. There is no custom, where delivery is provided for to barges, of inserting “15% more or less,” because we do not load vessels in that way.

(The record was here re-read.)

Mr. SUTRO.—Q. You answered that question “no.” You said that where delivery is provided for to be made to barges it is not customary to insert “15% more or less”; didn’t you say that?

A. He asked me the other way around, and I said “No.” I don’t know of any contracts made for delivery to barges.

(Testimony of A. A. Baxter.)

WITNESS.—(Continuing.) That is so, whether you put in 15% more or less or not. We do not make any contracts for export for delivery to barges, but we do make contracts for export and reserve to ourselves the right and privilege of moving some portion of that from the mill by barge to the vessel. We do not make contracts for barges at all, except at our option, to deliver some portion by barges. We do not make a contract for delivery of export lumber to barges. There is no custom on the subject that I know of, and there is no custom with [203—136] reference to delivering to barges at all, whether you add 15% more or less or not.

We were furnished with the specifications for the "Marston." If the "Marston" had put into port to take her loading, upon cutting these specifications as they were furnished to us, we as the seller would have complied with our obligations if the "Marston" had been there and we had cut to the specifications. These specifications did not tell us just how much lumber to cut. Supposing that the "Marston" had put into port to take her loading, we would not have cut 1,300,000 feet. We would cut 1,300,000 feet, less about 15% or perhaps 20%, to keep well within her carrying capacity. We would generally keep below what we thought was the carrying capacity of the vessel so as to have nothing left on hand when the vessel was loaded. I know, as a matter of fact, that she carried within one per cent of 1300 M feet four months afterwards, but I could not know it before. 1300 M feet was a pretty close guess. It is very

(Testimony of A. A. Baxter.)

easy to take these specifications and tell you what the cost of them would be on a \$9.50 base, and what it would be on a \$22.50 base. Any clerk can do that. I would be pleased to have that computation made for you. I will take these specifications and give you the cost of them on a \$9.50 base and on a \$22.50 base.

Q. I will not ask you to do it now, but you will have it done, won't you?

Mr. McCLANAHAN.—We will accept your figures on that basis.

Mr. SUTRO.—Those are the figures that we have given you. That will be satisfactory to us. Mr. Baxter can check it. We will leave it that way and see if he gets a different figure.

WITNESS.—(Continuing.) The term “f. a. s.” means free alongside, within reach of vessel's tackle. In the memorandum which relates to the proposed cargo, one of the four cargoes here, the term f. a. s.” there, mill wharf, means free alongside within reach of [204—137] the ship's tackle. “F. a. s. mill wharf” there means that the lumber was to be put free alongside on the mill wharf, but not only on the mill wharf, within reach of ship's tackle. With regard to whether it is a price term, it is in the list. With regard to whether it is one of the terms of the price, it is a condition of the sale of the list. It is on page 2 of the “G” list, “f. a. s.,” free alongside, within reach of ship's tackle. [205—137a]

Mr. SUTRO.—Q. I want to show you your price

(Testimony of A. A. Baxter.)

circular of May 24, 1917, and call your attention to the opening sentence:

“Prices delivery free alongside wharf and/or on mill’s option on barge.”

A. Yes.

Q. All within reach of ship’s tackle?

A. Yes.

WITNESS.—(Continuing.) That correctly defines the term “f. a. s.,” and the actual letters “f. a. s.” are free alongside, those three letters standing by themselves, but the sentence is not full. The words “free alongside” in this price circular of date May 24, 1917, standing by themselves, correspond to the abbreviation “f. a. s.,” but the abbreviation is not complete with the “within reach of ship’s tackle.” The list says so. In this price circular the words “free alongside” correspond to the letters “f. a. s.” After the “Marston” was named to carry this lumber, there came a time when we suspected or questioned whether she could make her loading date, and then there came a time when we became certain that she would not make her loading date; in other words, there was a period of time when there was some question in our minds as to whether she would make the loading date or not, and then there came a time when, so far as we could know, she could not make her loading date. There was a time when I felt confident that she could not. I would not say that I knew that she could not, but that it was improbable, when as a practical shipping man I knew she could not make her loading date. It would have

(Testimony of A. A. Baxter.)

been a miracle for her to do so. I would say that the time necessary for a sailing vessel to make a loading date in December, 1917, from Melbourne, would be about 100 to 120 days, as they vary from 100 to 120 days for the voyage.

Mr. SUTRO.—Q. In order to see if we can get down to some dates on this thing, on September 19, 1917, the plaintiff here sent you [206—138] these specifications, and on September 20, 1917, which would be within about ten days of the end of September, you wrote them, “The vessel’s position to-day, as reported in the ‘Guide,’ is 96 days out from Columbia River for Melbourne; even should she arrive there, she would have very little chance of discharging her cargo and returning to the Columbia River in time to commence loading in December.” At that time would you say that you knew practically that she could not make her loading date?

A. No, not at that time, but I thought it was doubtful at that time.

WITNESS.—(Continuing.) At that time it was beginning to be very doubtful, but it was not the period of certainty that had been reached.

Mr. SUTRO.—Q. Now, on October 1st you wrote: “We beg to advise that this order was sold for shipment by the ‘Marston’ loading date October to December, and we cannot see our way clear to consent to the change you request, namely, to deliver to a barge.” Now, that was within 91 days of the end of the loading period. Were you then certain that she could not reach her loading port?

(Testimony of A. A. Baxter.)

A. Was that on October 1?

Q. Yes.

A. She had not arrived yet. She arrived, I think, on October 4. Yes, I was reasonably sure that she could not make it.

Q. Had you then reached that degree of certainty that you have talked about here?

A. No, not positive.

WITNESS.—(Continuing.) I said on an average a voyage would take from 110 to 120 days to make that trip. When you have a period of ninety days, you do not know that she cannot make her loading date, because there is a difference between an average voyage and the time that the sailing vessel will do it. I think sailing vessels have [207—139] made the voyage in about sixty-five days, but it is an unusual thing. On October 1st she was three days out from Melbourne, but we did not know that on October 1st. She might have been thirty days out. We were watching the "Guide," but we knew nothing about it until she arrived, and we could not know when she would arrive. On October 12, 1917, we said, "We stand ready to carry out our contract, but will decline to change in the manner you suggest." On October 12th we knew as a reasonable certainty that she could not make her loading date. We felt reasonably sure that she could not make it at that time. At that date, as I recollect it now—it is three years ago—I had reached that degree of certainty which I have told you about. October 12th was 78 days from the end of December.

(Testimony of A. A. Baxter.)

I was reasonably sure on October 12th that she could not make her loading date. I knew it very nearly as well as I ever did. I reached this degree of certainty that I talked about this morning when I learned that the vessel was to carry return cargo. I surmised and believed she could not make the loading date before that date, but that sealed it absolutely. October 12th did not seal it, but it made it pretty certain.

Mr. SUTRO.—Q. As a matter of fact, you knew on September 20th that she could not make her loading date, and you so wrote the plaintiff, didn't you? You so told the plaintiff?

A. I do not think so. I have no such recollection. But I knew at that time that she was getting doubtful; her position was such as to indicate doubt as to whether she would make it or not.

WITNESS.—(Continuing.) If my letter is there to that effect, I did write to the plaintiff that she would have very little chance of discharging her cargo and returning to Columbia River on September 20th. I cannot remember all those letters. I mean to tell you that, having written on September 20th that she would have very little chance, I did not know more than three weeks later that she [208—140] could not make the date. I could not tell three weeks later because of the uncertainty of knowing as to a sailing vessel. They make a voyage sometimes from here to Puget Sound in four and one-half days, and at other times, 16 and 18 and 20 days. In all my experience I have known a sail-

(Testimony of A. A. Baxter.)

ing vessel to make the voyage from Melbourne to the Columbia River in seventy-three days. They have made it in less than sixty-five days. It is in the records of the Merchants Exchange that a ship like the "Marston" has made it in less than sixty-five days. I wrote to the plaintiff on October 17th and on the previous dates you have read to me, letters which practically indicated to them that I would not deliver this cargo because they could not have the "Marston" there in time, because one vessel out of perhaps several hundred has made the voyage in sixty-five days, and the average, I would say, is 110 to 120 days. It isn't for me to account for that. It is a matter of record. I do not remember when I had this talk with Mr. Comyn on the floor of the Exchange. I could not remember the date. It was before I had reached this degree of certainty. I do not know how long before, but it must have been before. I do not know whether it was a day or a couple of weeks. I could not go into that. That is three years ago. I cannot remember about the time. I remember the conversation very distinctly. I remember very clearly that the place was the Merchants Exchange, and I am very sure that it was Mr. Comyn. I think that it was probably in the month of September. He intimated to me that they could pay me a consideration for extending the loading period of the "Marston." He told me that she was chartered to return in ballast, that the owners wanted to change that clause in the charter-party, and have the option of bringing back a cargo,

(Testimony of A. A. Baxter.)

and I distinctly remember he mentioned copra as a partial cargo, or wheat—it might be wheat. I remember further that when I didn't take very kindly to his suggestion he said, "No, Baxter, you know we are [209—141] in the war, we should all be patriotic. They have an oversupply of wheat in Australia, a lack of tonnage to move it, and we on this Coast are eating more bread." Mr. Comyn told me of this on the floor of the Exchange. I remember generally the letter of September 20, 1917, in which I wrote, "This cargo, as you know, was sold for October/December loading. The vessel's position to-day is 96 days out from Melbourne." That was after we sent the specifications, in which we first called attention to the fact that she would probably not get here. I don't remember whether my conversation with Mr. Comyn was before that date or afterwards, but it must have been close along there somewhere; it must have been right close along there, I should say within two or three weeks. I would not like to be nailed down to saying that it would be within eighteen days. I cannot place the limit to this conversation. It was before I learned that he had made arrangements for rechartering the "Marston," but it had been accomplished before he approached me. My best impression is that it was in September that I had this conversation. I think it was in September. I do not know that Mr. Comyn was in Washington from September 7th until October 10th. If you told me that this was the fact, it would not change my recollection

(Testimony of A. A. Baxter.)

a particle. When you tell me that this was the fact, I say, then, that it must have been prior to September 7th. If it develops that Mr. Comyn was in Washington from September 7th to October 10th or October 8th, then I would say that I would place this conversation back of his trip to Washington, back of September 7th. I won't swear that it was prior to September 7th that he talked to me about making this change in the charter. I think it was. In our letter of September 20, 1917, we make no reference to this change in the charter.

Mr. SUTRO.—Q. You simply said the vessel would have very little chance of discharging her cargo because she was 96 days out from Columbia River to Melbourne. Did you think that the change in the [210—142] charter would make a change in her time of arrival here?

A. I thought it would put her backward.

WITNESS.—(Continuing.) In our letter of September 20, 1917, we assigned as the only reason the fact that she had not yet reached Melbourne. I still think that it was prior to September 7th that Mr. Comyn talked to me. I think it must have been.

Thereupon Plaintiffs' Exhibit 25 was admitted in evidence, and was in words and figures as follows, to wit:

(Testimony of A. A. Baxter.)

Plaintiffs' Exhibit No. 25.

“San Francisco, Cal., October 17, 1917.

Messrs. Comyn, Mackall & Co.,

San Francisco, Cal.

Dear Sirs:

With reference to the lumber charter of the ‘W. H. Marston’ dated April 11th, 1916, which provides that the vessel, after discharging her present lumber cargo in Australia, shall proceed ‘in ballast’ to her next lumber loading port; I have to confirm the arrangement made today whereby in consideration of Five thousand dollars (\$5,000) U. S. Gold, you agree to allow the owners of the vessel to bring back cargo from Melbourne to the Columbia and/or Willamette Rivers, and furthermore that the cargo of lumber to be furnished under the next lumber charter shall come from a Columbia and/or Willamette River mill, etc.

J. J. MOORE & CO.

By **JOHN B. BLAIR.**”

WITNESS.—(Continuing.) On October 16, 1917, the day prior to the letter, so far as a shipping man goes, even if the “Marston” had returned in ballast, I would think that she did not have more than one chance out of perhaps twenty of making her loading date for December loading under the contract. She had very little chance. She had practically no chance. A month later I do not know that she had lost that chance. On September 20th she had not arrived in Melbourne, and on October 4th

(Testimony of A. A. Baxter.)

she had arrived there. Her position was then known.

Thereupon the charter of the "Marston" was admitted in evidence as Plaintiffs' Exhibit No. 26. [211—143]

WITNESS.—(Continuing.) It was the custom and practice with my concern that the charters of these ships should be furnished to us, or copies of them furnished. It is a custom that a copy of the charter party be furnished to us before the vessel commences loading. Now, we get them as early as we can. To the best of my knowledge and recollection we never received a copy of the "Marston" charter-party. I suppose that we could have had it if we demanded it, but it is the custom of the charterer to send us a copy of the charter-party. If he fails to do so it is customary to ask for it. Looking at the charter of the "Marston," I would say that the cancellation date found on the last line was 12 o'clock noon of the 1st day of March, 1918; so that the charter of the "Marston" for which we sold this lumber would have been fulfilled if she had come back in ballast from Melbourne without any change in the charter and had arrived at her loading port at Astoria on March 1, 1918; that is, the charter would have been fulfilled as to the charterer, not the contract with me. I do not think we ever had a copy of the charter. By looking at it we could have ascertained the fact that the charter would have been fulfilled if the "Marston" arrived at her loading port at Astoria by March 1, 1918. If we had looked at the charter, we would have known that the

(Testimony of A. A. Baxter.)

vessel under her charter-party was not due to be canceled for failure to make her date of return, as long as she arrived by March 1, 1918.

Thereupon the sub-charter of the "Marston" by Comyn, Mackall & Co. was admitted in evidence as Plaintiffs' Exhibit No. 27.

WITNESS.—(Continuing.) If, through no fault of the buyer, there is a breach of the vessel's charter-party, so that they cannot tender the vessel, there are two answers as to whether or not they are thereby relieved from taking the cargo. There may be two reasons for a vessel not arriving. For instance, a vessel might be lost, [212—144] hopelessly lost, or damaged beyond repair, and in that case the buyer would be allowed a reasonable time within which to secure another vessel, taking into account the then condition of the freight market. If, for instance, it was during war times, I would say a reasonable time would be four months after the expiration of the delivery date. If it were to-day, I would say a reasonable time would be sixty days. Now, there is another phase to your question—supposing a breach of charter, that the vessel had arrived and had refused to go on with the charter, or supposing the vessel were late, our custom then would be, if she had not *starting* loading within the time, at our option we cancel the cargo entirely. I have a regular printed form on that. In case of delay, damage or loss of the vessel chartered, the buyer is not relieved under our custom, or the custom of the trade, from taking the cargo. But there are three questions there in-

(Testimony of A. A. Baxter.)

volved. Splitting it up, and supposing that the vessel is delayed so that she cannot make her loading date, it is at the seller's option whether the buyer is obliged to take the cargo when the vessel arrives, just the same as the cancelling date of a vessel is at the charterer's option if she is beyond her cancelling date; when she does arrive, the charterer declares his option within 48 hours of the time, either to take the vessel or to reject it. If the vessel is delayed, having been named in the contract, under such a contract as is in evidence here, the buyer is not relieved from taking the cargo. If she is damaged or lost—they go together—so that she cannot reach the loading port, he is under an obligation to take what was then cut to his specifications, what was cut at the time of the known loss or the known damage, and he is allowed a reasonable time within which to get new tonnage to move it. But if the vessel is lost before anything has been cut to the specifications, the contract is automatically canceled at the option of either party. If the vessel is delayed the buyer is not relieved. If the vessel is delayed, and fails to arrive, the buyer is not relieved of taking [213—145] the cargo. If the vessel is delayed to such an extent as the "Marston" was here, so that the buyer does not tender her, I would not give him any cargo if he did not put the vessel where I wanted it. Under such circumstances, the buyer is certainly not relieved. It would be a breach of contract, that is all, if he does not take it. If the vessel did not arrive, we would not give him any cargo at

(Testimony of A. A. Baxter.)

all, if there was no vessel to take it. Although the buyer is not relieved, he would have to take the lumber at the seller's option. If the market went up, it is at the seller's option whether he would have to take it or not.

Q. You did not say that a moment ago. You said he would not be relieved from taking the lumber, didn't you?

A. If the vessel is delayed he is not relieved from the taking of lumber.

WITNESS.—(Continuing.) The idea is that beyond the date of the contract the buyer has to take it, but the seller does not have to deliver it.

Mr. SUTRO.—Q. If the market goes down the seller does not deliver it, and if it does he takes it—I mean the other way around, if the market goes down the seller delivers it, and if it goes up the seller does not?

A. The seller is under no obligation to deliver it to him except within the date of the agreed contract.

WITNESS.—(Continuing.) Ninety days are allowed for the seller to take it, which is a great leeway, and he is supposed to take it within that time. If he does not take it within that time, it is always at the seller's option as to whether or not he will deliver it at a later date or an earlier date. I think I stated before why I put on this contract, Exhibit No. 1, "Sold prior to October 11, 1916." The Douglas Fir commenced actual business on the 1st of November, 1916. The organization of the Douglas Fir has not been a very important [214—146]

(Testimony of A. A. Baxter.)

circumstance in my life. It is true that it is my business. I would know pretty definitely when the Douglas Fir commenced operations. The 1st day of November, 1916, is the day when it was actually launched for business. The reason why the Douglas Fir, having been launched for business on November 1, 1916, I put in that contract [215—146a] "Sold prior to October 11, 1916," was that I was working on the Douglas Fir Exploitation & Export Company three years before it was accomplished. It was incorporated in 1913, and it was known if the company could ever be accomplished that I was to be its general manager. Now, along about in October, about this time, about the 10th to the middle of October, it became reasonably probable that the company would be accomplished. That meant a higher price. Everybody was expecting that, and that was the real object of it. Mr. Comyn was anxious to be covered on four cargoes that he had sold. I told him at that time that I had no authority to sell for the new company, but I expected it would be accomplished, and I would sell him those four cargoes for the Charles Nelson Company, and if the new company were accomplished we would transfer them over to the new company. I sold them to him at \$10 base, then, as all the other export houses were telephoning in asking, "Is this combine going to go?" I would say, "Well, it looks like it," and they would say, "Well, we had better get under cover with what we have got sold," and I told them there was no necessity, because if the combine were accom-

(Testimony of A. A. Baxter.)

plished we would take care of all their sales, and all their commitments, before we would put our price up. Now, when we did accomplish it, we asked them to send in to us a record of all their sales, and all their commitments, and they sent in a total of 18,000,000 feet, or about 18 cargoes, and they all reported it had been sold at \$9.50 base. These four cargoes were of record at \$10. I immediately communicated with Mr. Comyn by 'phone, or personally, and said, "Now, Comyn, we will cancel the \$10 contract and give you a \$9.50 contract, which will put you on the same basis as the other people." That is the way, and that is why that was put on there. I do not remember whether Mr. Comyn had a contract with the Charles Nelson Company dated October 17th. I do not recall ever seeing this paper which you show me, before. My initials are not on it. [216—147] My signature is not on it. I do not remember ever seeing or hearing of this before. I do not remember ever seeing the original of this before. To the best of my knowledge, I have not. I was the manager of the Charles Nelson Company up to the last day of October.

Mr. SUTRO.—Q. Don't you know that Mr. Comyn had a contract for four cargoes with the Charles Nelson Company?

A. For four cargoes?

Q. Yes. A. That is the four cargoes.

Q. This is the contract, is it not?

(Testimony of A. A. Baxter.)

A. No. This is the contract for four cargoes here.

Q. Don't you know that Mr. Comyn had this contract with the Charles Nelson Company, this contract dated October 17, 1917?

A. It seems as though it is the same vessel, the "Marston."

WITNESS.—(Continuing.) It appears to be the same contract. It must have been the same contract that we took over in this memorandum of November 2d, but I cannot understand its being October 17th here, and October 11th there. I cannot explain that. Four cargoes were transferred to the Douglas Fir Exploitation & Export Company, and the prices changed. I presume that this contract of October 17th is the contract referred to in the instrument of November 2d, as having been sold prior to October 11th, and if there is any error, it is in the dates.

Mr. SUTRO.—Q. Have you any doubt that the sale referred to in your memorandum of November 2, 1916, is the sale shown on this letter of October 17, 1916?

A. I do not want to go by that. This is the same as that, where it is marked Sold prior to October 11th. I don't know about this. I have no signature on that, but I think it is the same thing. I think it is all one and the same thing, but I don't know about that; I never saw that before, to my knowledge. [217—148]

(Testimony of A. A. Baxter.)

WITNESS.—(Continuing.) Our letter of November 2, 1916, indicates that there was a sale to Comyn, Mackall prior to October 11, 1916. I recognize this memorandum dated October 17, 1916. It may be the same thing. I think that it names the “Mars-ton.” I cannot remember ever seeing that letter of October 17th before, but I do remember the other one, the one which I hold in my hand. I have several times said that the Douglas Fir was launched for business on November 1, 1916. When you read from the letter addressed to Comyn, Mackall & Co., dated July 17, 1917, as follows, “We actually launched this company”—meaning the Douglas Fir—“for business on October 11, 1916, and as you know we immediately notified the export merchants here that we were willing to take off their hands all the old business they had on hand,” you do not refresh my recollection as to how the date came in there. I think we had a meeting of the Company on October 11th. We did not launch the Company for business on October 11, 1916, but I was elected General Manager on that date, to take effect November 1st. That is my recollection. The signature on the letter that you show me is my own. That letter contains the statement, “We actually launched this company for business on October 11, 1916.” There may be something further on as to that. What I had in mind as to the launching of the business on the first of November was that at that time I took possession of my position, and actually started that business, but I was elected, I think, on

(Testimony of A. A. Baxter.)

October 11th. It did not take effect until November 1, because I was still manager of the Charles Nelson Company until the last day of October, and commenced with the new company on the first day of November. As to which is the more important stipulation in my opinion in these two contracts, the naming of the loading time or the naming of the vessel, I think they are equally important. I have made contracts in which the vessel was not named. In some cases our printed form of contract provides that the vessel need not [218—149] be named until thirty days before her arrival. Our printed form for a sailing vessel provides that such a vessel is to be named and her position given at least thirty days before lay-days begin, but the loading days are always fixed in the contract. I still say that the loading dates and the names of the vessels are equally as important as the price. The name of the vessel does not affect the price. The naming of the time does affect the price. We have quarterly bulletins in which our prices vary. Throughout 1916 and 1917, the later the delivery the higher the price. The price was the same whether the vessel was named or not, where it was for the same delivery. I still think that the name of the vessel and the naming of the time are equally important. The naming of the time actually governed the price. I said this morning that a contract for 1300 M feet 15% more or less to suit capacity, in which a vessel is named, is a contract for a full cargo of that vessel, regardless of how much she might take. The

(Testimony of A. A. Baxter.)

purpose of putting in 1,450,000 or 1,300,000, more or less, is merely an estimate between the buyer and the seller that neither objects to, as to what the capacity of the vessel is. 15% more than 1,300,000 feet in this case would be 1,450,000 feet. If the "Marston" had been tendered to me, and she had required 1,600,000 feet or 1,700,000 feet, I would have loaded that excess at the same price, if she had arrived within her loading date. She would have been loaded by me at the same price. In fact the estimated quantity put in there, 1300 M, means nothing more to us than it would have meant had we omitted it, and just said a full and complete cargo for the "Marston," which is the same. The testimony of the witness Griggs that, if the capacity of the vessel exceeds the 15% named in the contract, the seller is not obliged to deliver that excess, is not correct on a named vessel. I will tell you why we demanded of Comyn, Mackall & Co. that they should pay us for the excess that the "Bowden" and "Golden Shore" were going to carry in excess of 15%, \$20 base price, instead of \$9.50. They are two entirely different cases. In the case of the "Marston" I sold him the [219—150] cargo for the "W. H. Marston." It was estimated at 1,300,000 feet, 15% more or less, but had she taken 25 or 30 per cent more or less, I was under an obligation to furnish her a full cargo. In the other case I sold him 1,450,000 feet to be lifted by two of his vessels to be named, 15% more or less to suit their capacity. Now, it was evidently his intention, and my expecta-

(Testimony of A. A. Baxter.)

tion at the time the contract was made, to name two vessels within that range. When he named the first vessel, she took considerably over half of it—I forget her name now. When he named the second vessel, she would exceed the contract, and, had I accepted that vessel without protest as coming within that range, I then would have been under an obligation, probably, to furnish it, but immediately he named the second vessel, she, taken in conjunction with what the first vessel had loaded, exceeded the amount I sold him. But that was a case where it was not a named vessel at the time of the contract, but he agreed to name two vessels to me, the capacity of the two combined to be 1,450,000, 15% more or less, and for the excess he had no contract, and I gave it to him at the greater price. He did have such a contract for the excess on the “Marston” and on the “Talbot,” because they were named at the time of the sale. He really had two contracts, one for the “Marston” and “Talbot,” for anything they might carry, and the other for two vessels to be named later, being the exact quantity that he specified, 15% more or less. That is the way the contract works out. It gets that result. That is my interpretation absolutely of this contract for four cargoes.

Mr. SUTRO.—Q. Of this contract for four cargoes, is it? A. Absolutely, yes.

Q. You wrote him, “We enclose herewith the following orders: Order No. 39, Schooner ‘W. H. Talbot.’ We have placed this with the Raymond Lum-

(Testimony of A. A. Baxter.)

ber Co., of Raymond, Washington; vessel to be named, 725,000. We have placed this cargo with the Hanify Co. at Raymond, [220—151] Washington. Vessel to be named, 725,000; we have placed this with the Kleeb Lumber Co., South Bend, Washington. Schooner 'W. H. Marston'; we have placed this cargo with the Knappton Mills & Lumber Co., at Knappton, Washington," and the "Marston" and "Talbot" cargoes were given at 1,300,000 and 1,000,000 feet. Do I understand you to say that if instead of putting in here "Vessel to be named," you had put in the vessel's name, that then he would not have been entitled, or would have been entitled to the excess cargo at the same price, regardless of the fact that that quantity was named?

A. Had these two vessels that he put in there later been named at the time of the contract, even though their capacity had been understated, I would have been under an obligation to furnish him a full cargo for both vessels.

WITNESS.—(Continuing.) We used both forms of contract in our company. We have only one form, but both conditions; that is, where the vessel is named in the contract, and where the vessel is not named in the contract. Our printed form does not necessarily provide for a vessel to be named. It works out both ways. The vessel is named, or the vessel is to be named. It works in both cases. Our printed form says, "Vessel to be named and position given 30 days before lay days begin." That is one part. In another part, at the top, we name

(Testimony of A. A. Baxter.)

the vessel, where the vessel is actually named in the contract. We put the name of the vessel on this printed form in there on a blank line, underneath the word "vessel," the "W. H. Marston," 1,300,000, 15% more or less to suit capacity of the vessel. Our contract in paragraph "G" recites, "Vessel to be named and position given 30 days or more before lay days." That does not mean some other vessel may be substituted. It means that if there is no vessel named up at the top, this condition down below will govern. That is our printed form, if she [221—152] is not named already in the contract up above.

This lumber for the "Marston" was never cut. None of it was cut. Prior to December 31, 1917, I was in a position to tell if I had any reason to expect that the vessel would be in a position to receive delivery. I instructed the Knappton Mills that the specifications had been furnished me, but that I was not sending them forward because the vessel could not make her loading date, because I did not think that she could make her loading date. I said something to that effect; I do not remember exactly. It is three years back, but I remember the substance of it. The meaning of it is there. I withheld the specifications from them anyway. On October 8th I wrote them, "This vessel has practically no chance of discharging there and arriving at your mills during December. We have the specifications, but have not forwarded them." The lumber was never cut. If Mr. Comyn had put a dozen

(Testimony of A. A. Baxter.)

barges up there, we would not have delivered the lumber to him. The fact that he only put one barge there makes no difference, not a particle of difference to us. I told him before he put the barge there, "Do not incur the extra expense; I will give you anything you want to satisfy you that we will not deliver the lumber to the barges." I think that is confirmed in the letter I wrote him. I do not know of any cases where export lumber has been delivered to barges for export. As a means of transporting it from the mill to the exporting vessel, we sometimes do that. There is quite a bit of it goes in that way. We have a regular base schedule charge for barging, and we modify those prices right along, but we do not export it by barges. We used barges to deliver it from the mill to the exporting vessel. We have price circulars for barging alongside an export vessel. We have not price circulars for barging alongside another barge. We have price circulars for barging to an export vessel, and nowhere else. The circular which you show me denominated Price Circular No. 1, dated May [222—153] 24, 1917, is ours. It provides, "If not ordered at the time of purchase to be charged as above plus 50 cents per thousand for all lumber that has already been cut and delivered on mill wharf."

Mr. SUTRO.—Q. So there is nothing contrary to custom in delivering the lumber to barges, whether for export or otherwise, I do not care, but there is nothing contrary to custom in delivering lumber on to barges, is there?

(Testimony of A. A. Baxter.)

A. I say there is; we do not deliver it on a barge; we use the barge as a means of delivering it to the vessel. Our delivery is not complete when it is put on the barge. It is our lumber until it goes into the ship's slings.

WITNESS.—(Continuing.) We insure it when it comes aboard the barge. Our delivery is not complete until the lumber is in the ship's sling. If the barge turned turtle, so that we do not deliver it to a barge, if the wharf burned down on which the lumber was delivered, the loss would be ours, before it was in the ship's sling. We deliver it on the wharf, but that does not constitute delivery. We put it on the wharf. Our base price in October/December, 1917, for this lumber, for October/November/December loading—on August 30, 1917, we issued the price list which was in effect until January 24, 1918; that would be the price list. Our old price list for September to December, 1917, was \$20 base, "H" list—not "G" list. We did not have any price for "G" list. We changed to the "H" list, and it superseded the "G" list, and this \$20 was net cash. We dropped the old custom of $2\frac{1}{2}$ and $2\frac{1}{2}$. The letter which you show me dated August 8, 1917, is signed by me. In the fall of 1917 my relations with Mr. Comyn were such that for a period of time I refused to sell him lumber.

Mr. McCLANAHAN.—That answer is limited to new business, not the present contract.

Mr. SUTRO.—Yes. That is all. [223—154]

**Testimony of Robert Dollar, for Plaintiff
(In Rebuttal).**

ROBERT DOLLAR was called as a witness on behalf of the plaintiffs in rebuttal, and being first duly sworn, testified as follows:

I have been in the export lumber business for some time, approximately forty years. My companies are the Dollar Steamship Company. We have different companies. There are other Dollar Companies than the Dollar Steamship Line. We have our own line of steamers. I am familiar with export lumber contracts and the custom pertaining to them.

Mr. SUTRO.—Q. Suppose a contract is made for a million feet, 15% more or less, to suit capacity of vessel, the vessel being a sailing vessel, and the vessel is named in the contract, and the vessel fails to make her loading date, which we will assume is October to December, 1917, she fails to get there in time, what is the custom of the trade with reference to the obligation of the seller to deliver that lumber to the buyer if he demands it and agrees to take it within the time specified on some other craft?

A. To take it within the time specified?

Q. Yes, on some other craft.

A. The custom would be that he could put in another craft if his ship was delayed, or if for some reason he could not get the ship, it would be quite in order to put in another craft to take it if he took it in time.

(Testimony of Robert Dollar.)

Q. Under such circumstances, is there a custom which would govern the respective rights and obligations of the seller and buyer with reference to the delivery of that lumber?

A. If it could not be delivered on one craft, the custom has been that it could be delivered on another craft.

Q. Is there a custom which would entitle the buyer to tender its barges to take that lumber?

A. It would be immaterial, as long as it did not cost any more to deliver it to barges than it would cost to deliver it to the vessel [224—155] in question. That would be my judgment.

WITNESS.—(Continuing.) Where a contract provides for delivery f. a. s. mill wharf, or free alongside the mill wharf, I do not think that there is any custom that governs the right of the buyer to take the lumber otherwise than in a sailing vessel or on barges, if he took it within the time stipulated, and he was willing to take the lumber not any faster than what the mill had agreed to deliver. For instance, a sailing vessel generally takes about 70,000 feet a day, or probably 75,000, and a steamer would want a quarter of a million feet a day; so that it would not be the custom that the mill would be forced to deliver the lumber quicker than it was intended in the first place to the craft.

Mr. SUTRO.—Q. Would there be a custom on a f. a. s. mill wharf contract that would require or would not require the mill to deliver the lumber if the buyer was ready to take it?

(Testimony of Robert Dollar.)

A. Oh, no—there is a custom, yes. The mill would have to deliver it.

WITNESS.—(Continuing.) In cases where the vessel is named, I do not think that the custom is so material. The reason of naming a vessel, I would say, is to give a latitude, so that if the ship is late, and she was about to arrive, they would have to give it even after the time stipulated. Prior to October, 1916, there was a custom of the trade according to which, if a sailing vessel was named and did not make her loading date, she would be loaded if she made the date after the time fixed. That is always the custom for a reasonable time; not for all time to come, because the vessel might be lost and never would come. If the contract is made for 1,300,000 feet, 15% more or less to suit capacity of a named vessel, and the vessel is not tendered, I should think that under the custom the quantity that would be delivered would be as near the exact amount as was stipulated for in the contract as possible. The reason for [225—156] elasticity to the contract is that sometimes a ship will take more and sometimes less than the ordinary cargo, and, hence, there is a stipulation in there of 10, 12, 14 or 15% more or less. If the ship is not produced, and the buyer demands the delivery on barges, the mill, according to the custom, would deliver him the exact amount, unless there was some left on the wharf there, and the mill would have a right to compel them to take that if the barge could carry it, to

(Testimony of Robert Dollar.)

clear the wharf and not leave tag ends of lumber cut specially for a certain market.

Mr. SUTRO.—Q. Would the same custom prevail, or would it not prevail, where the lumber was cut, and where it was not cut, if the buyer demanded delivery within the time specified.

A. The custom is, the mill does not start cutting lumber for a sailing vessel until she is here off the coast, or nearby, somewhere. With a steamer it is different. With a steamer you have got to have at least half the cargo on the dock when she arrives, but a sailing vessel, ordinarily, the custom is to cut the lumber about as quick as she will take it.

WITNESS.—(Continuing.) If a sailing vessel is not produced and is delayed, and the buyer furnishes the specifications and offers to take the lumber in some other manner than on a sailing vessel, I should say that the custom is that if I had a contract of that kind, and I have had some of them myself, I would never think of refusing to give the lumber to be delivered to some other vehicle or craft.

Cross-examination.

I do not think that that would be a matter of grace on my part. I know the Douglas Fir Company. I know that they are sellers of lumber for export. I knew nothing about this case until I came here. Mr. Baxter represents the Douglas Fir Company. I am not a member of the Douglas Fir. I am a manufacturer in [226—157] British Columbia and in Oregon. I have been manufacturing in Oregon. I am on both sides of the fence.

(Testimony of Robert Dollar.)

I am not a manufacturer in Oregon now, although I have been in the past. I beg your pardon, though, we have been manufacturing in Portland, I forgot that. It is customary for the parties to approximate the carrying capacity of the cargo and put it in the contract within 15% more or less. I am familiar with that class of contract. When such a contract is entered into, naming the vessel, and putting down the approximate carrying capacity, and following it by the limitation 15% more or less to suit the capacity of the vessel, where the delivery date is fixed at October to December, meaning that delivery is to take place at any time within the limitation, there is a custom that extends that delivery date to a reasonable extent. If the ship has been delayed for some reason, and would be in soon, it is not customary to say you must have the ship there, a sailing ship, on the day. Steamers are different. It is customary to extend that a reasonable length of time. By custom, I mean that it is being done. I have done it. I know others who have done it. I do not mean by the use of the expression "custom" that the seller of the lumber would have to extend the contract, but it is customary amongst us to do it. You might say that it is customary to grant that as a matter of grace. If we stuck to our legal rights, we would have to deliver the lumber within the delivery date. If the named vessel does not appear, there is a custom by which the buyer can put in another vessel within the delivery time. By custom in this respect I mean that we have been in the habit of doing it.

(Testimony of Robert Dollar.)

Mr. McCLANAHAN.—Q. Doing it, but you do not mean to say that the contract could be changed in that respect, when the contract names a particular vessel and the cargo is one to suit that particular vessel?

A. I don't know just what to say about custom. I am talking [227—158] about what we generally do amongst ourselves. I being a manufacturer of lumber, and a ship owner, it is customary to do it. I could not say that that is an absolute custom, because you might ask me what is the custom. We do it amongst ourselves. I would do it. For instance, if I sold a cargo of lumber to be delivered on a certain sailing vessel, and the owner of the sailing vessel, or the man that bought the cargo, said, Now, that ship has come to grief, or says, I don't know where she is, I am going to put in another vessel of like capacity; I certainly would give him the lumber, more especially if it was within the stipulated time. But if it was beyond the stipulated time, out of courtesy I should not stick for a few days, but I would have the right, I think the legal right, to say, No, the ship was to be here in December, and this is the 1st of January, and he would not be entitled to it. That is my judgment.

WITNESS.—(Continuing.) Offhand, I could not name one case where vessels have been allowed to be substituted for a named vessel in a contract, and where it was a sale of a cargo to suit the capacity of that named vessel, but I know I have done it myself. I think that it is customary. I do not think there

(Testimony of Robert Dollar.)

would be any question raised about it. Different vessels carry different cargoes. Of course, if I contracted to furnish a cargo of 1,300,000 feet to a ship, and the price went up, and the man said, "I am going to substitute a 2,000,000 ship for that," I would say, "Well, I will give you 1,300,000 feet at this price, but you must give me the difference for a 2,000,000 ship." The sale under a contract containing this expression, 1300 M feet, 15% more or less to suit the capacity of the named vessel, the amount of that sale, cannot be determined until after the vessel is loaded and her capacity found out.

Mr. McCLANAHAN.—Q. Now, when you substitute for that particular vessel another vessel, don't you run the chance that the substituted [228—159] vessel will carry more or less, perhaps, than the named vessel?

A. If they put in a ship to me to carry 2,000,000 feet, and I had agreed only to furnish 1,300,000 feet, I would give them 1,300,000 feet and no more, unless they gave me the increased price. It would be optional for me to give her any more.

Q. But the sale would be of a parcel of lumber to suit the capacity, the loading capacity of a particular ship, and if you substituted another ship similar in appearance, similar in tonnage, you would still not be delivering on the substituted ship the cargo that would suit the capacity of the named ship, would you?

A. You might or might not. It would altogether depend on whether the price of lumber had gone up

(Testimony of Robert Dollar.)

or gone down. If the price of lumber had gone down, everything would be lovely, so far as the mill would be concerned, and if the price of lumber had gone up, then it would not be.

WITNESS.—(Continuing.) I know nothing of this case, as to whether the price of lumber had gone up.

**Testimony of W. Leslie Comyn, for Plaintiffs
(Recalled).**

W. LESLIE COMYN, recalled as a witness on behalf of plaintiffs, having previously been duly sworn, testified as follows:

Between September 7th and October 8th, 1917, I was in Washington and New York. I was not in San Francisco during any part of that time.

Testimony of James Tyson, for Defendant.

JAMES TYSON, was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I reside in Piedmont, and my occupation is lumber and shipping. I am president of the Charles Nelson Company. The Charles Nelson Company has been incorporated about twenty years. Captain Nelson was engaged in the business about forty years before that. Sixty [229—160] years in all in the lumber and shipping business, as an individual and a corporation. I have been president of the corporation eleven years. I am supposed to be intimate with the lumber and shipping business of the concern. We

(Testimony of James Tyson.)

have two mills located on Puget Sound. The average annual output of those mills I would say, roughly, is about 150,000,000 feet. I am supposed to be familiar with contracts for the sale of lumber to named carrying vessels. The meaning of the term "f. a. s." is free alongside the ship, within reach of ship's tackles. There is a custom of the trade where a cargo of export lumber is sold to be carried by a named vessel, which is to load within a specified time, that requires that named vessel to be there within the loading period specified to make the contract good. That custom prevailed in 1916 as well as at the present time. It was general and well recognized at that time. There was no custom of the trade at that time under which the buyer could present the named vessel either before the designated loading period or after the expiration of that period. The contract covered the period. There was no custom at that time by which a buyer could substitute barges for the named loading vessel without the consent of the seller, within the loading period. The buyer could not substitute another vessel for the named vessel within the loading period without the consent of the seller. I have had experience with contracts for the loading of named vessels, where the vessel failed to make the loading date; that is to say, our company has.

Mr. DERBY.—Q. Has your company ever cancelled any contracts because the vessel failed to make the loading date specified in the contract?

Mr. SUTRO.—He can testify to the custom, your

(Testimony of James Tyson.)

Honor, but I don't think on cross-examination he can testify to what he did.

The COURT.—No, he cannot testify to what his particular company may or may not have done; it may have gotten into a controversy with [230—161] some buyer, the same as your company has.

Mr. DERBY.—Does your Honor sustain the objection?

The COURT.—Yes, I don't think that is proper.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 10.

Cross-examination.

I am one of the trustees of the Douglas Fir. I represent the Charles Nelson Company on the board. I have not been actively instrumental, perhaps, in developing the policy of the Douglas Fir; I guess I have been, passively. I do not attend many meetings of the Board of Trustees of the Douglas Fir, because the meetings are held in Seattle and Portland, and I do not go north to attend meetings. When the meetings are held here, I sometimes go to them, and I sometimes do not. I have a voice in the policy. I do not admit that my concern is one of the large and important members of the Douglas Fir. We are simply one of a good many. There are probably none who are larger or more important members than Pope & Talbot. We are probably next to Pope & Talbot. I cannot admit that we are very important. With regard to whether or not prior to the operation of the Douglas Fir there were many cases

(Testimony of James Tyson.)

where a vessel could not make her loading date in time, and where the seller extended the time for loading, I would say that it was often done by mutual consent. It was very usual for the seller to extend the loading date. I will explain that if you will permit me. On a rising market, it was not done; on a level market, where the prices did not change, it was often done. But on a rising market, where the lumber was worth more for later loading, it was not very often done. It was done by mutual consent, and as an accommodation to the buyer. Where there was a sale of a specified quantity of lumber, 15% more or less to suit [231—162] the capacity of the vessel, if the vessel took more than the specified quantity plus the 15%, the seller was not obliged to deliver that excess up to capacity of the vessel. If a vessel has a capacity of 2,000,000 feet, and there is a contract for 1,300,000 feet, 15% more or less, the buyer could not claim the entire 2,000,000 feet to suit the capacity of the vessel, from us. As a matter of custom, he would be entitled under such a contract to the maximum of his contract. That would be 1350 M plus 15 per cent. If he wanted more than that to fill the vessel, and if the market had gone up, he would have to make a special deal for that excess. It is optional with the seller to give it to him or not, as he saw fit. The sale of a quantity of lumber, 15% more or less to suit capacity of the vessel, is, so far as the maximum is concerned, a sale of that quantity plus 15%. That is the way I would construe it.

(Testimony of James Tyson.)

Mr. SUTRO.—Q. And it is not the sale of a full cargo to that vessel?

A. They are supposed to name the quantity that will cover the load or the cargo of the vessel. An illustration, if the vessel carries one and a half million only, ordinarily you cannot always gauge the capacity of a vessel exactly, because in the summer time they will carry more and in the winter time they will carry less, they generally name the average capacity of the vessel, and then they have the 15% to go on, up or down.

WITNESS.—(Continuing.) The controlling factor in the quantity that the mill must deliver under such a contract is the quantity stated plus 15% more or less, and not the capacity of the vessel. So far as I remember, I have not known of instances where lumber sold under a contract, which either named a vessel or provided that a vessel was to be named, was delivered to barges where the vessel could not make the loading date. I could not say that such instances did not occur with our firm, without going over the records. If it were [232—163] done, it was by special arrangement and as an accommodation to the buyer.

Mr. SUTRO.—Q. What I am driving at is, you will not say, will you, that your firm has not delivered lumber, export lumber, sold under a contract where a vessel was named and did not make her loading date, to barges, whether by special arrangement or otherwise?

(Testimony of James Tyson.)

A. To be stored at another place for later shipment?

Q. To deliver on to barges, the buyer to take it as he saw fit.

A. We have delivered to barges very often for transshipment at Seattle, where the steamers would not come to the wharf, or where it was cheaper for the buyer to barge the lumber to a steamer in Seattle or Tacoma than to bring the steamer to our wharf.

WITNESS.—(Continuing.) I do not think that I have known of cases where by special arrangement export lumber was delivered to barges without any restriction, where the sailing vessel could not make the loading date, not unless the vessel was named or unless bills of lading afterwards would be produced to prove that the lumber went export. I have no recollection of it. I know a Mr. Thornton. He is in our office. He is in charge of the sales records in the office. I know the schooner "W. H. Smith." I guess that we had a contract with Dant & Russell to load the "W. H. Smith," and she was quite late in making her loading date. Dant & Russell loaded her after she was late. The market had not gone up any. I do not think that the market had gone up to the extent of \$30,000 on that cargo. I could not tell you without the data how much it had gone up. They did load her away beyond the cancelled date for us. That was last year; no, it was the present year; it must have been early this year, I think it was about March or April. I do not remember the market for lumber in March or

(Testimony of James Tyson.)

April of this year. As to whether it was higher or lower than in the fall of last year, I really don't know. They have been raising and lowering the prices. It is [233—164] not a fact that until very recently we have been on a rising market. I think the price dropped about \$5 about six months ago. I do not know when we bought that cargo for the "W. H. Smith." It was some time last year. I think we bought it for November/December loading. She had heavy repairs to make here, and the strike intervened, and she was about six months here repairing. I cannot tell you how much the market had gone up. If I were at my office I could tell you. I know that as a matter of fact Dant & Russell loaded the "W. H. Smith" several months late. I do not know whether the market went up. I could not say that. Mr. Baxter can tell you what the prices were during the period for which the cargo was engaged, and also the period during which it was loaded. I am not familiar with the prices. I can furnish you all this information. I cannot do it to-day though. I am going back to my office from here. I will telephone it out. I will look it up and see what loading she was booked for, and also what loading she made. The fact that if Dant & Russell had taken the market price for that shipment, we would have had to pay \$30,000 more than our contract called for—that could not be, because the very most would be a difference of \$5,000 per thousand, and she carried, as I recall it, about one and a quarter million, so that would be only \$7,500—

(Testimony of James Tyson.)

no, a million and a quarter would be \$6,000. I do not think that she carried a lot of clear lumber. I think it was all common lumber. I will look it up and telephone it to you.

Redirect Examination.

With regard to my testimony that the seller is not obliged to supply more than the excess of 15% over the contract price, that is simply my construction of the contract. I could only give my own construction, I could not give the other fellow's. The seller is not bound to load beyond the carrying capacity of the vessel. That is all she could carry. He could not move any more than the ship [234—165] could carry. The carrying capacity of the vessel varies with different seasons of the year. You cannot estimate just what it will be. That is the reason why they put in the 15% more or less. In the case of the "W. H. Smith," delivery was not made to barges, but to the ship. She was loaded late, because she was delayed here by reason of the shipyards strike. She was three or four months behind her time. We made the arrangements with Dant & Russell to load her whenever she was ready to load. We had to make a special arrangement with them, because she was beyond her time, but they were willing to grant that concession. The Charles Nelson Company has refused to load vessels which fail to make the loading period specified in the contract. We do that upon a rising market. On a level or a falling market we do not.

(Testimony of James Tyson.)

Recross-examination.

The time of delivery in the Douglas Fir contracts, or in the contracts such as we are accustomed to make, is supposed to govern the price, because the price is made for that particular loading and for that particular period. The prices often shift. Contracts are frequently made for a specified quantity, 15% more or less, vessel to be named. In such a contract, the thing that governs the price is the price stipulated in the contract. The price is always stipulated. That has nothing to do with the first quarter, or the second quarter, or the third quarter. Where she is not named in the contract, the name of the ship is an incident to the contract; but where she is named in the contract, it is a part of it. It is not an incidental part; it is a positive one. Very frequently contracts are made, vessels to be named.

Testimony of Claude L. Daly, for Defendant.

CLAUDE L. DALY was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I reside at 2318 Grove Street, Berkeley. I am employed by [235—166] J. J. Moore & Company. In 1916 and 1917 I was employed by Comyn, Mackall & Co. in the Australian Lumber Department. I never told Mr. W. Leslie Comyn, the plaintiff in this case, that Mr. J. B. Blair, of J. J. Moore & Co., had offered the Douglas Fir Exploitation & Export Company, or Mr. Baxter, the manager of that company, \$2,500 or any other sum, if the Douglas Fir

(Testimony of Claude L. Daly.)

Exploitation & Export Company would extend the loading period of the "W. H. Marston." As manager of the Australian Lumber Department of Comyn, Mackall & Co., I myself made that offer to Mr. Baxter on behalf of Comyn, Mackall & Co.

Mr. DERBY.—Q. Mr. Daly, I notice your name is signed to some of these letters as J. Claude Daly; you have testified that your name is C. L. Daly.

A. My name is C. L. Daly.

Q. How does it happen that some of these letters are signed J. Claude Daly?

A. That is the peculiar way I sign by name.

Cross-examination.

The offer that I made was made in conversation with Mr. Baxter in his office. Mr. Comyn was not in the East at that time; he was in San Francisco. I left Comyn, Mackall & Co. on March 1st of this year, on the day following Mr. Comyn's return from Europe. I was in charge of his export lumber department for Australia for four years. As nearly as I can say, I was managing Mr. Comyn's export department for four years. I left on the day after he got back from Europe, and went to J. J. Moore & Co. They are competitors of Mr. Comyn's. With regard to how long Mr. Comyn was in Europe, I believe he left San Francisco in October, 1919, and I left in March. He was away five or six months. During those six months I did not assist J. J. Moore & Co. in the transaction of their business. I have had no differences with Mr. Comyn of my own seeking. I have not overdrawn my account there \$11,000.

(Testimony of Claude L. Daly.)

There is a controversy on about that now. I claim that I overdrew \$2,700, and Mr. [236—167] Comyn is incorrect. He may claim that I overdrew \$11,000, and that is the controversy now. I had some conversations with Mr. Baxter in 1917 with regard to his selling lumber to Comyn, Mackall & Co. It is quite a time back to recollect. I recollect this "Marston" controversy.

**Testimony of A. A. Baxter, for Defendant
(Recalled).**

A. A. BAXTER, being recalled as a witness on behalf of the defendant, having previously been duly sworn, testified as follows:

Since the examination yesterday I have refreshed my memory as to when, or approximately when, this offer of \$2,500 or \$3,000 was made to me by Mr. Daly. I now forget the date, but there was a letter which I wrote to the Knappton Mill Company. My recollection is that it is dated August 25th. The letter which you show me refreshes my memory and shows I wrote them on August 25, 1917. On that date I had knowledge from a representative of the plaintiff on the subject of whether the "Marston" was coming back in cargo. That knowledge came from Mr. Daly. He told me they had accepted \$5,000 to permit her to return in cargo, and offered to give me \$2,500 of it. I do not know positively that he said that settled the matter of her bringing the cargo back, but prior to this date he offered to give me \$2,500 out of the \$5,000 he was to receive. That is

(Testimony of A. A. Baxter.)

as far as I can say. It was after December 31, 1917, if at all, that I cancelled the contract for the "Marston" with the mill.

Mr. McCLANAHAN.—Now, if the Court please, in order to save the record, I offer to prove that the defendant commenced doing business on November 1, 1916, in anticipation of the passage by the Congress of the United States of what was and is now known as the Webb-Pomerene Bill, being the Act of April 10, 1918, permitting the organization of corporations or associations for the sole purpose of engaging in export trade, and being an amendment of what is popularly known as the Sherman Act. I offer to prove that the [237—168] anticipated early passage of the said Webb-Pomerene Bill was postponed, and said bill did not finally become law until April 10, 1918. That between the date of November 1, 1916, and the passage of the said Webb-Pomerene Bill, the defendant did business as an exporter only of Douglas fir, with the tacit consent of the Federal Trade Commission, a commission created by the Act of Congress on September 26, 1914, which commission, on the passage of said Webb-Pomerene Bill, was given, by that law, jurisdiction and supervision over the business and the affairs of corporations or associations organized to do an export lumber business.

Mr. SUTRO.—Pardon me a moment, Mr. McClanahan: This matter was pleaded and was stricken out by the Court.

The COURT.—But he is offering it now merely to make a record.

(Testimony of A. A. Baxter.)

Mr. SUTRO.—I will stipulate that you have made an offer to prove all the matters embraced in your special defenses, if you want to.

Mr. McCLANAHAN.—All right, that will be very satisfactory.

The COURT.—And the offer is overruled, or denied, and you have your exception.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 11.

Mr. McCLANAHAN.—I offer to prove that plaintiffs' contract with their Australian buyers of the specification cargo to be furnished under the specification cargo contract in suit, was carried out at a profit to the plaintiff, and that such profit was the profit which the contract originally carried, although such contract with the Australian buyers was fulfilled by the "W. H. Marston" with the cargo loaded under the Dant & Russell contract.

The COURT.—The objection to that will be sustained, and you may have an exception. [238—169]

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 12.

Cross-examination.

Mr. SUTRO.—Q. Mr. Baxter, you testified this morning that prior to August 25, 1917, you were told by Claude Daly, that man who was on the stand here just now—that he had received \$5,000 for permitting the "Marston" to come back in cargo instead of in ballast: Is that your testimony?

(Testimony of A. A. Baxter.)

A. Yes. I don't know that I testified that he had received it, but that he had offered me \$2,500 out of \$5,000 that they could expect, or were offered, or had received—I don't know whether they had received it, I won't say they had received it.

Q. Well, you did say that.

A. Well, if I did say they had received it, I wish to change that and say that either he had or was going to receive it.

WITNESS.—(Continuing.) He positively offered me \$2,500. On August 25, 1917, I am not perfectly clear that Mr. Daly's firm had positively agreed to bring the "Marston" back in cargo, in consideration of \$5,000, but they had that offer, or they had accepted the offer, I am not sure which he told me. It might be either way, but he positively offered me \$2,500 if I would extend the loading date. On August 25, 1917, or prior to that date, I understood from Mr. Daly that he could get \$5,000 or some sum in excess of \$2,500 if he would permit the "Marston" to come back in cargo, and that he offered me at that time \$2,500 of that sum which he said he could receive or which he had received. The state of affairs, as I understood it on August 25, 1917, was that Mr. Daly's firm could get a consideration for permitting her to come back in cargo. Of that consideration he offered me \$2,500 firm. Prior to August 25, [239—170] 1917, Mr. Daly did not offer me \$5,000. I am sure of that. No one else on behalf of Comyn, Mackall & Company offered me \$5,000, but they intimated that possibly an amount larger than \$2,500

(Testimony of A. A. Baxter.)

would be paid. Prior to August 25, 1917, I do not think they intimated that \$5,000 might be paid to my company if it would agree to permit the "Marston" to take on a cargo, but they intimated that an amount larger than \$2,500 might be paid. I do not know how high the amount offered might have reached. I do not think any amount was intimated at all, but it was just that more might be given. The purpose of Mr. Daly's offer was to obtain our consent to extending the time to load the "Marston" and to take her when she arrived.

Mr. SUTRO.—Q. Let me put it to him this way: You will not state, will you, that on August 25, 1917, or prior thereto, Mr. Daly's firm had actually received or agreed to take compensation for bringing the "Marston" back in cargo? A. No.

Q. I want to show you this contract, Form B, that you testified to yesterday. In the line "Quantity," did you tell me yesterday that that line contemplates that the name of the vessel should be inserted there?

A. It works both ways.

WITNESS.—(Continuing.) It contemplates that it may either be named there, or that it may be left blank, the vessel to be named later. That is not a blank for figures. My answer is no, and yet, still, there is a part of it that might be yes.

Mr. SUTRO.—Q. I am asking you whether your printed form of contract, whether you do not contemplate that over the word "Quantity," in about line 3 of the contract, it is not intended in that form that figures should be inserted there, and not the name of the vessel?

(Testimony of A. A. Baxter.)

A. If the vessel is known at the time the contract is made, the [240—171] vessel would be named, “W. H. Talbot,” 1,000,000 feet, 15% more or less. That would be one case. Now, in another case, the vessel is not named in the contract, then you would insert just 1,000,000 feet, 15% more or less, the vessel to be named later.

WITNESS.—(Continuing.) The blank space there, with or without the name of the vessel, is intended for figures.

Thereupon Plaintiffs’ Exhibit No. 28 was admitted in evidence, and was in words and figures as follows:

Plaintiffs’ Exhibit No. 28.

**“DOUGLAS FIR EXPLOITATION &
EXPORT CO.**

San Francisco, Cal., ———, 191—.

Contract Form ‘B’

Sailer Cargo

- A. Confirming sale to you of the usual assortment of Sawn Douglas Fir Lumber of sizes, lengths and grades, as per usual ——— specification.
- B. QUANTITY: ———15% more or less to suit capacity of vessel.
- C. LOADING DISTRICTS: Puget Sound or Grays Harbor or Willapa Harbor or Columbia and/or Willamette Rivers. At not more than one accessible loading place in any one district where vessel can safely lie always afloat. Cargo to be delivered free alongside on wharf and/or at mills option or barge within reach of ship’s tackles.

- D. MONTHS OF LOADING: —
- E. LOADING DISPATCH: 60 M Feet Board Measure per working day.
- F. DEMURRAGE: If any at — per net registered ton per day to be paid by the loading mill or mills or dispatch if earned equal to $\frac{1}{3}$ of the amount provided as demurrage to be paid by the vessel to the loading mill or mills for each day or fraction of day gained in loading.
- G. VESSELS: To be named and position given 30 days or more before lay-days begin unless otherwise mutually agreed.
- H. SPECIFICATIONS: To be furnished 30 days or more before lay-days begin.
- I. MARKING: The Clear and Select will, at buyer's option, be marked by the seller free of charge. This to enable receivers of cargo to easily separate the [241—172] grades. Any further marking if ordered by the buyer to be done by the seller at following cost: Any distinguishing mark of not over 3 letters 10c per M; lengths on one end malleted in 15c; lengths and dimensions on one end malleted 25c.
- J. PRICE: — —
Base — list NET CASH and all other conditions of sale as per — list, except marking charges as above provided for. Payment to be made in United States Gold Coin within five days after delivery of documents.
- K. TALLY & INSPECTION: At loading port by Pacific Lumber Inspection Bureau, certificate to be furnished and to be final. Buyer's option to

also inspect in accordance with — List and any differences between the two to be settled by the Chief Supervisor of the Pacific Lumber Inspection Bureau or his Assistant.

- L. STEVEDORES: If any employed to be satisfactory to the loading mill.
- M. Buyers not to be responsible for any consequences arising through the delay, damage or loss of the vessel chartered and named to the seller to load under this contract, nor for the failure of the vessel or her owners to fulfill the charter-party, or for breach of charter-party on the part of vessel, its owners and/or agents, but the provisions of this paragraph shall not relieve buyers from the taking of this cargo or any part of it then out and ready on mill's dock, and/or on barges; provided, however, that a reasonable time be allowed the buyer to lift such lumber, taking into account the then condition of the freight market.
- N. In case vessel is known to be lost or damaged and abandoned before anything has been cut on this order by the mills, then the buyer may, at his option, to be declared within ten days of such notice, either cancel the order or declare another vessel not more than 60 days later loading than above provided for the original loading.
- O. In case of fire, flood, snow, or other conditions beyond control of the loading mill, or mills, they to have privilege of moving vessel to another mill at their expense, but time lost on above account and/or in moving not to count as lay-days.

P. This agreement contingent upon Acts of God, Civil Commotions, Floods, Frosts, Snow, Ice, Storm, Fire, Fog, Railway, Mill or Machinery Accidents or Impediments, Strikes, Lockouts, Labor Disputes, Riots or Disturbances, Holidays, inability to secure transportation, or other causes of delay beyond the control of either party to this agreement.

(Signed in triplicate)

DOUGLAS FIR EXPLOITATION &
EXPORT CO.

By _____,
Seller.

_____,
By _____,
Buyer." [242—172a]

Thereupon defendant rested its case in chief.

**Testimony of W. Leslie Comyn, for Plaintiffs
(Recalled in Rebuttal).**

W. LESLIE COMYN, being recalled as a witness on behalf of the plaintiffs, in rebuttal, and having been previously duly sworn, testified as follows:

The letter which you show me dated October 29, 1917, from the Charles Nelson Co., signed by F. G. Thornton, the gentleman Mr. Tyson spoke about, was received by our firm.

Thereupon Plaintiffs' Exhibit No. 29 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 29.

"San Francisco, Cal., October 29th, 1917.

Comyn, Mackall & Co.,

310 California St.,

San Francisco, Cal.

Gentlemen:

We have yours of the 24th inst. calling our attention to your letter of Sept. 25th relative taking deliveries of cargoes for the 'Robert B. Hind,' 'Encore' and 'Jas. H. Bruce' by barge should any of these vessels not make their respective loading, i. e.:

Schr. 'R. B. Hind,' capacity abt. 650 M. Nov./Dec. '17/Jan. 18, loading.

Schr. 'Encore,' capacity abt. 700 M. Jan./Feb./Mch. '18, loading.

Schr. 'Jas. H. Bruce,' capacity abt. 650 M. Feb./Mch./Apl. '18, loading.

We beg to say that you have the privilege of putting in barges for [243—172b] these cargoes in the event of any or all of these vessels being late, but this does not give you the privilege of substituting the Schr. 'H. D. Bendixen' for the Schr. 'Encore,' and to which we cannot agree. It is up to you to take delivery by the Schr. 'Encore' and if not, then by barges.

Very truly yours,

THE CHARLES NELSON CO.

Per F. G. THORNTON."

(Testimony of W. Leslie Comyn.)

WITNESS.—(Continuing.) This is one of the instances I had in mind when I stated on my former examination that sometimes lumber was taken by barges where the sailing vessel could not be produced. The lumber specifications that were furnished in this case to the Douglas Fir, and which they did not cut, were those known as Australian specifications. Those specifications are suitable only for the Australian export trade. The “Marston” had been loaded before with lumber many times. The quantity that she would take was approximately well known. The variation in this case of the amount that she actually loaded under the Dant & Russell contract was approximately 14,000 feet in excess of the 1,300,000 feet.

Cross-examination.

The contracts under which this concession was made to allow barges to be used, and which is referred to in this letter just introduced, I imagine are in our possession. They would be in the office.

Thereupon Plaintiffs’ Exhibits Nos. 30, 31 and 32 were admitted in evidence, and were in words and figures, respectively, as follows, to wit:

Plaintiffs’ Exhibit No. 30.

“September 1st, 1917.

Messrs. The Chas. Nelson Co.,
230 California Street,
San Francisco, California.

Dear Sir:

We now beg to confirm conversation between your

Mr. Tyson and the writer, and the arrangements within made.

‘Geo. E. Billings’—It is understood that this vessel board, and there is on the dock for her [244—173] 150 M feet. You have wired the Mill to allow the vessel to clear up this lumber off the dock, and she then proceeds to the Dominion Mill Company at Port Blakely to complete loading. It is understood that we have no claim against you in regard to the balance of the cargo.

In consideration of your Mills being closed by strike, and your inability, owing thereto, to load the ‘Rosamond’ and ‘Espada,’ it is agreed that you permit us to divert both these vessels to other loading points, and in substitution thereof you have agreed to supply either a usual West Coast or Australian specification to the following ships at \$11.00 Base ‘G’ List, less $2\frac{1}{2}\%$ and $2\frac{1}{2}\%$, this being the contract price at which you were to load the ‘Rosamond’ and the ‘Espada.’

The names of the vessels are:

‘R. R. Hind’—capacity of about 650 M, and expected to make November, December, ’17, January, ’18, loading.

‘Encore’—capacity of about 700 M, expected to make January, February, March, ’18, loading.

‘James H. Bruce’—capacity about 650 M, expected to make February, March, April, ’18, loading.

In the event of your being prevented by strikes and/or lock-outs from loading any or all of the above three vessels we to have the privilege of substituting other vessels or barges to take delivery

of the quantity of about 2,000,000 feet at \$11.00 Base 'G' List, less $2\frac{1}{2}\%$ and $2\frac{1}{2}\%$ within 90 days after the starting up of your Mills and your logging camps, you to notify us when you commence operations.

Please confirm, and return us one copy.

Yours faithfully,

COMYN, MACKALL & CO.,

Per _____.

CLD/L."

Plaintiffs' Exhibit No. 31.

"September fifth, Nineteen-seventeen.

Messrs. Chas. Nelson Company,

230 California St.,

San Francisco.

Dear Sirs:—

We have to acknowledge receipt of your September 4th, T-1, in duplicate.

The same appears to us to be in order with the exception that in the event of either of the three vessels named, namely the 'R. R. Hind'—'Encore'—'Jas. H. Bruce,' not making their specified loadings, we shall have the right of taking delivery of the cargoes of each and all of them by barges, and it is on this understanding that we accept the arrangement.

You will readily understand the reasons for this. If your mill is operating at the loading dates named on the respective vessels, and any or all of them should not make the specified loading [245—174] dates, you would be at liberty to abrogate the con-

vs. W. Leslie Comyn and Benjamin F. Mackall. 307

tract, which would work a hardship on us in view of our taking the 'Billings'—'Rosamond' and 'Espada' cargoes from you and completing same at current prices.

Faithfully yours,

COMYN, MACKALL & CO.,

Per _____.

CLD—W."

Plaintiffs' Exhibit No. 32.

THE CHARLES NELSON CO.

"Yards:

San Francisco—Oakland
Wilmington—Los Angeles
San Jose—Sacramento
Hanford—Monterey
Watts—Torrence
Salinas—Martinez
Concord—Suisun

Mills:

Mukilteo, Wash.
Humboldt Bay, Cal.
Port Angeles, Wash.
Merced Falls, Cal.

Cable Address: 'Tyson.'

In reply refer to
No. T-4.

Manufacturers of Fir, Spruce, Redwood, Sugar and
White Pine Lumber Box Shook.

Hind Building,

230 California Street.

San Francisco, Cal., September 7th, 1917.

(Received Sept. 8, 1917.)

Comyn, Mackall & Co.,

310 California St.,

City.

Gentlemen:—

(Quotations subject to change without notice.
All agreements on our part are contingent upon the
Acts of God, strikes, lockouts, fires, floods, accidents,
or inability to secure cars or tonnage, or other causes
beyond our control, arrest or restraint of Princes,
Rulers, and People, the rights of eminent domain,

(Testimony of W. Leslie Comyn.)

exercised by the State or Nation, commandeering of vessels or products. Taxes National or State levied on freight bills to be paid by the purchaser.)

Yours of the 5th inst. in duplicate, received. We note you wish the right to take delivery of the cargoes for the 'R. R. Hind,' 'Encore' and 'Jas. H. Bruce' by barges in the event of any or all of these vessels not making their respective loading dates, to which we agree. Herewith please find accepted copy of your letter.

Very truly yours,

THE CHARLES NELSON CO.

Per F. G. THORNTON.

FGT—HJ."

WITNESS. — (Continuing.) The Australian specifications are the same ones that were furnished to Dant & Russell. The specification was received from the buyer in Australia. The peculiarity of Australian [246—175] specifications is that they run largely to large sizes, six by twelve, and larger, together with a lot of lath, which is only usable in Australia, according to its size. The amount of lath that can be put into one cargo for export under the "G" list is limited under the "G" list, but we always supply a great deal more. They always call for about two million lath to the cargo.

Mr. McCLANAHAN.—Q. But this contract was made under the "G" list, was it not, with the Douglas Fir?

A. The Douglas Fir accepted the specifications.

(Testimony of W. Leslie Comyn.)

WITNESS.—(Continuing.) The contract was made under the terms and conditions of the “G” list, and they accepted the “G” list, which called for the lath which was in the specifications. The Australian buyer of these large pieces of lumber cuts them up in Australia in their own mills supposedly. I do not know whether they bring them in in as large bulk as they can, for the purpose of the trade there. I have not been in Australia for twenty years. I believe that is the fact, but I do not know it of my own knowledge.

**Testimony of Harry I. Zimmet, for Plaintiff
(In Rebuttal).**

HARRY I. ZIMMET, called as a witness on behalf of the plaintiffs in rebuttal, being duly sworn, testified as follows:

I am in the import and export business with A. F. Thane & Co. We are in the lumber business. We have been in the lumber business a little over eight years. We have done an export lumber business, and I am familiar with the customs of the trade.

Mr. SUTRO.—Q. What is the custom of the trade with respect to the obligation of the seller to deliver lumber on a contract specifying the quantity 15 per cent more or less to suit capacity of vessel, where the buyer cannot produce the vessel? Do you get the question?

A. Yes, I get the question. Well, I don't really know as to that, we have never had a case in our own

(Testimony of Harry I. Zimmet.)

experience on a quantity [247—176] 15% more or less where we have not put the vessel in.

WITNESS.—(Continuing.) Of my own knowledge I would say that I do not know of any custom in the trade in case a sailing vessel is late and cannot make her loading date, and the contract calls for a specific quantity, 15% more or less, to suit capacity of vessel, which requires the seller to deliver the lumber. I know of instances where a cargo has been delivered to barges.

Cross-examination.

In a contract for a cargo purchased from the Douglas Fir, with a definite delivery date, the Douglas Fir refused to deliver the cargo because of the non-arrival of the vessel. We have a claim against them. We have an arrangement with them that if we win this case, they are to pay us. The name of the boat is the "Georgiana," and the contract was one where there was a specific time named as the delivery date. It was a named vessel. They had in the contract a limitation of 15% more or less to suit capacity of the vessel. I think there was a definite amount named as the estimated carrying capacity of the vessel. We subsequently loaded that vessel somewhere else under a similar contract, where she loaded within the delivery date. I could not say offhand what she carried.

Thereupon plaintiffs rested their case in rebuttal.

That the foregoing is all the testimony given in the case.

(Testimony of Harry I. Zimmet.)

Mr. McCLANAHAN.—Now, I want to renew the motion for the nonsuit in the exact terms in which it was made before.

Thereafter the Court denied said motion of defendant for a nonsuit.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 13. [248—177]

Mr. McCLANAHAN.—Defendant also moves that the Court find in favor of the defendant upon the grounds stated in the motion for a nonsuit and upon the further ground that there is no substantial evidence or any evidence to sustain a finding in favor of the plaintiffs, and that upon the whole case, and on all the evidence, the Court can find only in favor of the defendant. Defendant requests that this motion be considered in the same manner as a motion to direct a verdict in a jury case, and as raising the question of whether there is any substantial evidence or any evidence which would support a finding or judgment for plaintiffs.

Mr. DERBY.—If your Honor please, when the Court passes on that motion, if the motion is denied, will he be deemed to have excepted to the ruling of the Court?

The COURT.—Yes.

The Court subsequently denied defendant's said motion for a finding in favor of the defendant.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 14.

That thereafter, and upon the 28th day of December, 1920, the Court made certain findings of fact in the above-entitled case. That the first of said findings of fact was as follows, to wit:

“1. That prior to October 17, 1916, the plaintiff had contracted to purchase from Charles Nelson & Co., Manufacturers of Lumber, and the Nelson Company to sell to it 3,500,000 feet, ten per cent more or less Oregon (fir), shipment or loading July to December, 1917. No receiving vessel was named in the contract but a memorandum thereof was enclosed in a letter of date October 17, from the plaintiff to Nelson Company, saying that ‘it is probable that we will load under this contract the W. H. Marston, October, November, December, and the W. H. Talbot for same loading; on the balance of the contract we may put in two of our own vessels estimated 1,450,000 capacity, October, November, December.’ Thereafter and on November 1, 1916, defendant corporation, composed of various manufacturers [249—178] of fir lumber in Oregon and Washington, including the Charles Nelson Company, commenced doing business and took over the sales of lumber of the member concerns for export, and its letter to plaintiff of date November 2, 1916, as set out in Article III of the complaint was confirmatory of and by reason of the previous contract between the Nelson Company and plaintiff.”

To which said finding by said Court defendant duly excepted and now assigns the same as error.

EXCEPTION No. 15.

That Finding No. 2 of said Findings of Fact by said Court was as follows, to wit:

“2. In the lumber trade the letters f. a. s., f. o. b. and a. s. t., as used in the contracts between the plaintiff and defendant as set out in the pleadings mean respectively ‘free alongside; within reach of ship’s tackles,’ ‘free on board’ and ‘at ship’s tackles,’ and were so understood by both parties at the time of the making of such contracts.”

To which said finding by said Court defendant duly excepted and now assigns the same as error.

EXCEPTION No. 16.

That Finding No. 8 of said Findings of Fact by said Court was as follows, to wit:

“8. That on October 23, 1917, plaintiff notified defendant that it would have barges alongside the mill wharf on November 25th, ready to take delivery, and on the date named in such notice plaintiff did have a barge at the dock ready to take delivery. Defendant refused to make such delivery and on January 2, 1918, notified plaintiff that as the ‘Mars-ton’ had not arrived and the time had expired by limitation it had cancelled the contract.”

To which said finding by said Court defendant duly excepted and now assigns the same as error.

EXCEPTION No. 17.

That Finding No. 9 of said Findings of Fact by said Court was as follows, to wit: [250—179]

“9. That during the month of December, 1917, the prevailing market price of lumber at the place

of delivery was \$22.50 per thousand net base 'G' list, being a difference on the quantity of lumber specified in the contract between the market price and the contract price of \$17,511.00."

To which said finding by said Court defendant duly excepted and now assigns the same as error.

EXCEPTION No. 18.

That upon said 28th day of December, 1920, the Court reached certain conclusions of law in the above-entitled case.

That the first of said conclusions of law was in words and figures as follows, to wit:

"First: That the failure of the plaintiff to have the 'Marston' alongside the mill wharf ready to take delivery of the lumber within the delivery dates did not relieve the defendant from making delivery as demanded by plaintiff."

To which said conclusion of law by said Court defendant duly excepted and now assigns the same as error.

EXCEPTION No. 19.

That the second of said conclusions of law was in words and figures as follow, to wit:

"Second: That plaintiff is entitled to judgment against defendant for the sum of \$17,815.00 with interest from December 7th, and its costs and disbursements."

To which said conclusion of law by said Court defendant duly excepted and now assigns the same as error.

EXCEPTION No. 20.

Thereafter, within the time required by law, de-

fendant petitioned the Court for a new trial, which said motion for a new trial, after the same has been submitted for decision upon briefs, was by the Court, upon the 16th day of April, 1921, denied.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 21. [251—180]

That upon the 25th day of February, 1921, counsel for plaintiffs and for defendant entered into a stipulation extending the term of court for the purpose of the preparation, filing and signing by the Court of defendant's bill of exceptions, and upon said day the Court made an order based upon said stipulation so extending the said term of court. Said stipulation and said order were in words and figures as follows, to wit:

“(Title of Court and Cause.)

STIPULATION AND ORDER EXTENDING
TERM OF COURT.

IT IS HEREBY STIPULATED by and between the respective parties hereto that the time for the decision upon defendant's petition for a new trial in the above-entitled action, and also the time for the serving of defendant's proposed bill of exceptions and the signing by the Court of defendant's engrossed bill of exceptions, and the filing of said engrossed bill of exceptions, in the said action, together with all procedure incident or necessary thereto, shall be extended from the term of court within which the decision in the above-entitled action was rendered to the term of court following

said term of court first herein referred to, and to such a time within said term of court last referred to as shall be subsequent to the ruling of said court upon said petition for a new trial in said action and within a reasonable time after said ruling.

Dated February 24th, 1921.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiffs.

McCLANAHAN & DERBY,

CHICKERING & GREGORY,

Attorneys for Defendant.

Pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that the time for the decision upon defendant's petition for a new trial in the above-entitled action, and also the time for the serving of defendant's proposed bill of exceptions and the signing by the Court of defendant's engrossed bill of exceptions, and the filing of said engrossed bill of exceptions, in said action, together with all procedure incident or necessary thereto, shall be extended as by the terms of said stipulation is provided.

Dated February 24th, 1921.

FRANK H. RUDKIN,

Judge of the Above-entitled Court." [252—181]

That upon the 3d day of May, 1921, counsel for plaintiffs and for defendant entered into a stipulation concerning certain of the exhibits which had been introduced by defendant at the trial of this case, which said stipulation was and is in words and figures as follows, to wit:

“(Title of Court and Cause.)

STIPULATION AND ORDER CONCERNING
ORIGINAL EXHIBITS.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that defendant's original exhibits, introduced in evidence at the trial of the above-entitled action and marked respectively Defendant's Exhibits 'B,' 'C,' 'D' and 'E,' may be omitted both from the Bill of Exceptions and the Transcript of Record on appeal in said cause, and may be filed in the United States Circuit Court of Appeals for the Ninth Circuit in the original form in which said exhibits were introduced, and be considered as original exhibits in the Transcript of Record on Appeal, and said exhibits need not be printed.

Dated May 3, 1921.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiffs.

McCLANAHAN & DERBY,

CHICKERING & GREGORY,

Attorneys for Defendant.

It is so ordered.

WM. C. VAN FLEET,

Judge.”

And now, within the time required by law, defendant presents and files with the Court its bill of exceptions to be used upon appeal from the judgment entered in the above-entitled cause.

Dated July 19, 1921.

McCLANAHAN & DERBY,
CHICKERING & GREGORY,

Attorneys for Defendant. [253—182]

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the foregoing bill of exceptions on appeal from the said judgment heretofore rendered in the above-entitled action is correct, and the same may be settled and allowed by the above-entitled court.

IT IS FURTHER HEREBY STIPULATED that the foregoing bill of exceptions may be settled and allowed without the Southern Division of the Northern District of California by the Judge who sat at the trial of the above-entitled action with the same force and effect as if settled within said Southern Division of the Northern District of California.

Dated this 19th day of July, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

CHICKERING & GREGORY,
McCLANAHAN & DERBY,

Attorneys for Defendant.

The foregoing bill of exceptions on appeal from the said judgment having been duly presented for settlement within the time required by law, and the stipulation by the parties found to be correct, the same is hereby approved, settled and allowed.

Dated this 22d day of July, 1921.

R. S. BEAN,
United States District Judge. [254]

Receipt of a copy of the within Engrossed Bill of Exceptions is hereby admitted this 19th day of July, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 25, 1921. Walter B. Mal-
ing, Clerk. [255]

(Title of Court and Cause.)

Stipulation and Order Extending Term of Court.

IT IS HEREBY STIPULATED by and between the respective parties hereto that the time for the settlement of defendant's proposed bill of exceptions and of plaintiffs' proposed amendments thereto, and the signing by the Court of defendant's engrossed bill of exceptions and the filing of said engrossed bill of exceptions in the above-entitled action, together with all procedure incident or necessary thereto, shall be extended to any time within that term of said court which shall begin in the month of July, 1921.

Dated June 28th, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

CHICKERING & GREGORY,
McCLANAHAN & DERBY,
Attorneys for Defendant.

It is so ordered.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Jun. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [255 $\frac{1}{2}$]

(Title of Court and Cause.)

Petition for Writ of Error and Supersedeas.

The above-named defendant, Douglas Fir Exploitation & Export Company, a corporation, feeling itself aggrieved by the order of this Court and the judgment entered against it in this cause in the sum of Seventeen Thousand Five Hundred Ninety-two and 72/100 (\$17,592.72) Dollars, with costs, on the 31st day of December, 1920, a petition for a new trial having been denied upon the 16th day of April, 1921, comes now by its attorneys and petitions this Court for an order allowing it to prosecute a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit under and in accordance with the laws of the United States in that behalf made and provided, and that an order may be made fixing the amount of security which plaintiff shall give and furnish upon said writ of error conditioned as required by law in cases where a supersedeas and a stay of execution are desired.

Dated June 24, 1921.

CHICKERING & GREGORY,
McCLANAHAN & DERBY,

Attorneys for Defendant.

[Endorsed]: Filed June 24th, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [256]

(Title of Court and Cause.)

Assignment of Errors.

Now comes the defendant above named, and files the following assignment of errors upon which it will rely on the prosecution of its writ of error in the above-entitled cause:

I.

That the trial court erred in overruling defendant's demurrer to plaintiffs' complaint herein.

II.

That the trial court erred in sustaining plaintiffs' demurrer to the five separate defenses set up in Articles I, II, III, IV, and V of said answer, beginning on page 11 of said answer and ending on page 19 thereof.

III.

That the trial Court erred in sustaining plaintiff's demurrer to the separate defense set up in Article I of said answer, beginning on page 11 and ending on page 14 thereof.

IV.

That the trial Court erred in sustaining plaintiff's demurrer to the separate defense set up in Article II of said answer, beginning on page 14 and ending on page 16 thereof.

V.

That the trial Court erred in sustaining plaintiff's demurrer to the separate defense set up in Article III of said answer, beginning on page 16 and ending on page 17 thereof.

VI.

That the trial Court erred in sustaining plaintiff's demurrer to the separate defense set up in Article IV of said answer, beginning on page 17 and ending on page 19 thereof. [257]

VII.

That the trial Court erred in sustaining plaintiff's demurrer to the separate defense set up in Article V of said answer, on page 19 of said answer.

VIII.

That the trial Court erred in rendering and entering the judgment against defendant in this cause, for the reason that the evidence was and is insufficient to support said judgment or any judgment against defendant.

IX.

That the trial Court erred in rendering and entering the judgment against defendant in said cause, for the reason that the evidence was and is insufficient to support said judgment in the sum of \$17,592.72 (with costs), inasmuch as the maximum judgment warranted by the evidence in said cause was for a sum at least 15% less than that amount; the contract upon which suit was brought having had in it the term that defendant should deliver 1300 M feet, 15% more or less—and the judgment for \$17,592.72 having been based upon a failure to deliver 1300 M feet without said 15% reduction.

X.

That the trial Court erred in rendering and entering the judgment against defendant in this cause,

for the reason that the evidence was and is insufficient to support said judgment, inasmuch as there is no evidence that the failure of plaintiffs to have the schooner "Marston" alongside the mill wharf, ready to take delivery of the lumber within the delivery dates, did not relieve defendant from making delivery as demanded by plaintiffs.

XI.

That the trial Court erred in admitting in evidence the testimony of W. Leslie Comyn as to the meaning of the words, "sold prior to October 11, 1916," contained in "Plaintiffs' Exhibit 1," the ruling upon which question is the subject of [258] Exceptions Nos. 1 and 2 in defendant's bill of exceptions.

XII.

That the trial Court erred in admitting in evidence the testimony of the witness, C. E. Dant, as to whether or not said witness, in his experience prior to October, 1916, had known of any case where the seller of lumber refused to extend the time of delivery because the vessel could not make the loading date, which said ruling of said Court is the subject of Exception No. 3 of defendant's bill of exceptions.

XIII.

That the trial Court erred in excluding the answer of the witness Comyn to the following question: "Are the terms and conditions of 'G' List for the benefit of both buyer and seller?" which said ruling of said Court is the subject of Exception No. 4 of defendant's bill of exceptions.

XIV.

That the trial Court erred in excluding testimony

offered by defendant to establish that plaintiffs' contract with their Australian buyers of the specification cargo to be furnished under the specification contract in suit was carried out at a profit to plaintiffs, and that such profit was the profit which the contract originally carried, although such contract with the Australian buyers was fulfilled by the "W. H. Marston" with a cargo loaded under the Dant & Russell contract, which said ruling of said Court is the subject of Exceptions Nos. 5, 6, 7, and 8 of defendant's bill of exceptions.

XV.

That the trial Court erred in denying defendant's motion for a nonsuit, made at the close of plaintiffs' case in chief, [259] inasmuch as each and every of the fifteen grounds set forth as the reasons why said motion for nonsuit should be granted were, and each of them was, a sufficient reason for granting said motion, which said ruling of said Court is the subject of Exception No. 9 of defendant's bill of exceptions.

XVI.

That the trial Court erred in excluding the testimony of the witness James Tyson in answer to the question as to whether or not his company had ever canceled any contract because the vessel failed to make the loading date specified in the contract, which said ruling of said Court is the subject of Exception No. 10 of defendant's bill of exceptions.

XVII.

That the trial Court erred in excluding testimony offered by defendant, which said offer was made in the manner following, to wit:

“Mr. McCLANAHAN.—Now, if the Court please, in order to save the record, I offer to prove that the defendant commenced doing business on November 1, 1916, in anticipation of the passage of the Congress of the United States of what was and is now known as the Webb-Pomerene Bill, being the Act of April 10, 1918, permitting the organization of corporations or associations for the sole purpose of engaging in export trade, and being an amendment of what is popularly known as the Sherman Act. I offer to prove that the anticipated early passage of the said Webb-Pomerene Bill was postponed, and said bill did not finally become law until April 10, 1918. That between the date of November 1, 1916, and the passage of the said Webb-Pomerene Bill, the defendant did business as an exporter only of Douglas Fir, with the tacit consent of the Federal Trade Commission, a commission created by the Act of Congress on September 26th, 1914, which commission, on the passage of said Webb-Pomerene Bill, was given, by that law, jurisdiction and supervision over the business and the affairs of corporations or associations organized to do an export lumber business.

Mr. SUTRO.—Pardon me a moment, Mr. McClanahan: This matter was pleaded and was stricken out by the Court.

The COURT.—But he is offering it now merely to make a record.

Mr. SUTRO.—I will stipulate that you have made an offer to prove all the matters em-

braced in your special defenses, if you want to.
[260]

Mr. McCLANAHAN.—All right; that will be very satisfactory.”

Which said ruling of said Court is the subject of Exception No. 11 of defendant's bill of exceptions.

XVIII.

That the trial Court erred in excluding testimony offered by defendant, which said offer was as follows, to wit:

“I offer to prove that plaintiffs' contract with their Australian buyers of the specification cargo to be furnished under the specification cargo contract in suit, was carried out at a profit to the plaintiff, and that such profit was the profit which the contract originally carried, although such contract with the Australian buyers was fulfilled by the ‘W. H. Marston’ with the cargo loaded under the Dant & Russell contract.”

Which said ruling of said Court is the subject of Exception No. 12 of defendant's bill of exceptions.

XIX.

That the trial Court erred in denying defendant's motion for a nonsuit in said cause when, at the close of all the testimony taken in said cause, said motion was renewed in the exact terms in which it had originally been made, which said ruling of said Court is the subject of Exception No. 13 of defendant's bill of exceptions.

XX.

That the trial Court erred in denying defendant's

motion, at the close of said case, for a finding in favor of defendant, upon the grounds previously stated in the motion for nonsuit and upon the further ground that there was no substantial evidence, or any evidence to sustain a finding in favor of the plaintiffs, and that upon the whole case, and on all the evidence, the Court could only find in favor of the defendant; which said ruling of said Court is the subject of Exception No. 14 of defendant's bill of exceptions. [261]

XXI.

That the trial court erred in making a certain finding of fact, inasmuch as there is no evidence in the record to support said finding and the same has no bearing on the case. Said finding is as follows:

"1. That prior to October 17, 1916, the plaintiff had contracted to purchase from Charles Nelson & Co., Manufacturers of Lumber, and the Nelson Company to sell to it 3,500,000 feet, ten per cent more or less Oregon (fir), shipment or loading July to December, 1917. No receiving vessel was named in the contract but a memorandum thereof was enclosed in a letter of date October 17, from the plaintiff to Nelson Company, saying that 'it is probable that we will load under this contract the W. H. Marston, October, November, December, and the W. H. Talbot for same loading; on the balance of the contract we may put in two of our own vessels estimated 1,450,000 capacity, October, November, December.'" Thereafter and on November 1, 1916, defendant corporation, com-

posed of various manufacturers of fir lumber in Oregon and Washington, including the Charles Nelson Company, commenced doing business and took over the sales of lumber of the member concerns for export, and its letter to plaintiff of date November 2, 1916, as set out in Article III of the complaint was confirmatory of and by reason of the previous contract between the Nelson Company and plaintiff."

XXII.

That the trial court erred in making a certain finding of fact, inasmuch as there is no evidence in the record to support said finding. Said finding is as follows:

"2. In the lumber trade the letters f. a. s., f. o. b. and a. s. t., as used in the contracts between the plaintiff and defendant as set out in the pleadings mean respectively 'free alongside; within reach of ship's tackles,' 'free on board' and 'at ship's tackles,' and were so understood by both parties at the time of the making of such contracts."

XXIII.

That the trial court erred in making a certain finding of fact, inasmuch as there is no evidence in the record to support said finding. Said finding is as follows:

"8. That on October 23, 1917, plaintiff notified defendant that it would have barges alongside the mill wharf on November 25th, ready to take delivery, and on the date named in such notice plaintiff did have a barge at the

dock ready to take delivery. Defendant refused to make [262] such delivery and on January 2, 1918, notified plaintiff that as the 'Marston' had not arrived and the time had expired by limitation it had cancelled the contract."

XXIV.

That the trial court erred in making a certain finding of fact, inasmuch as there is no evidence in the record to support said finding. Said finding is as follows:

"9. That during the month of December, 1917, the prevailing market price of lumber at the place of delivery was \$22.50 per thousand net base G list, being a difference on the quantity of lumber specified in the contract between the market price and the contract price of \$17,511.00."

XXV.

That the trial court erred in denying defendant's petition for a new trial, for the reason that each and every of the grounds set forth in said petition were, and each of them was, sufficient reason for granting said petition.

XXVI.

That the trial court erred in concluding, as a matter of law, that under the contract in suit defendant was bound to deliver lumber to plaintiffs whether the schooner "Marston" was at the dock to take such delivery or not.

XXVII.

That the trial court erred in not holding and deciding, as a matter of law, that the sale in the above

case was the sale of a cargo of lumber to suit the capacity of the schooner "W. H. Marston," which could only be fulfilled by the presence of said schooner at the loading port within the specified loading period.

XXVIII.

That the trial court erred in not holding and deciding, as a matter of law and of fact, that the requirement of the contract calling for the lifting of the lumber by the schooner "W. H. Marston" was a requirement which was for the benefit of the seller, as well as the buyer, and which could not be waived by the buyer alone. [263]

XXIX.

That the court erred in not making, rendering and entering a judgment for the defendant.

WHEREFORE said defendant prays that the judgment of said trial court be reversed.

CHICKERING & GREGORY,

McCLANAHAN & DERBY,

Attorneys for Defendant.

[Endorsed]: Filed June 24th, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [264]

(Title of Court and Cause.)

**Order Allowing Writ of Error and Supersedeas and
Fixing Amount of Bond.**

The defendant above named, having this day filed its petition for a writ of error and supersedeas from the judgment heretofore entered herein against it

to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors, all in due time, and praying that an order be made fixing the amount of security which defendant shall furnish on said writ of error,—

IT IS HEREBY ORDERED that a writ of error herein is hereby allowed to have said judgment reviewed in the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED, that upon said defendant filing with the Clerk of this Court a good and sufficient bond in the sum of Twenty Thousand (20,000) Dollars to the effect that if said defendant shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its plea good, then said obligation to be void, otherwise to remain in full force and virtue, said bond being approved by this court, all further proceedings in this court shall be and they are hereby suspended and stayed until the determination of the said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: June 24th, 1921.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed June 24th, 1921. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[265]

(Title of Court and Cause.)

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, Douglas Fir Exploitation & Export Company, a corporation, as principal, and National Surety Company, a corporation, as surety, are held and firmly bound unto W. Leslie Comyn and Benjamin F. Mackall, copartners doing business under the firm name of Comyn, Mackall & Co., the plaintiffs above named, in the sum of Twenty Thousand (20,000) Dollars, to be paid to said W. Leslie Comyn and Benjamin F. Mackall, their heirs and assigns, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 24th day of June, 1921.

WHEREAS, defendant above named has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment entered by the above-entitled Court in favor of plaintiff and against defendant in the sum of Seventeen Thousand Five Hundred Ninety-two and 72/100 (17,592.72) dollars:

Now, therefore, the condition of this obligation is such that if the above-named defendant shall prosecute said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise it shall be and remain in full force, virtue and effect.

WITNESS our seals and names hereto affixed
the 24th day of June, 1921.

DOUGLAS FIR EXPLOITATION & EX-
PORT COMPANY,

By A. A. BAXTER,

General Manager. [266]

NATIONAL SURETY COMPANY,

By FRANK L. GILBERT,

Resident Vice-President.

[Seal]

Attest: A. C. ROBESON,

Resident Assistant Secretary.

State of California,

City and County of San Francisco,—ss.

On this 24th day of June, in the year one thousand
nine hundred and twenty-one, before me, John Mc-
Callan, a notary public in and for the said City and
County of San Francisco, residing therein, duly com-
missioned and sworn, personally appeared Frank
L. Gilbert and A. C. Robeson, known to me to be the
resident vice-president and resident assistant secre-
tary, respectively, of the National Surety Company,
the corporation described in, and that executed the
within instrument, and also known to me to be the
persons who executed it on behalf of the corpora-
tion therein named, and they acknowledged to me
that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set
my hand and affixed my official seal, at my office in
the City and County of San Francisco, the day and
year in this certificate first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires April 12, 1921.

The premium charged for this bond is \$90.46 per annum.

The foregoing bond is hereby approved this 24th day of June, 1921.

WM. C. VAN FLEET,
Judge. [267]

[Endorsed]: Filed Jun. 24, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [268]

(Title of Court and Cause.)

**Stipulation and Order Concerning Original
Exhibits.**

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that defendant's original exhibits, introduced in evidence at the trial of the above-entitled action and marked respectively Defendant's Exhibits "B," "C," "D" and "E," may be omitted both from the bill of exceptions and the transcript of record on appeal in said cause, and may be filed in the United States Circuit Court of Appeals for the Ninth Circuit in the original form in which said exhibits were introduced, and be considered as original exhibits in the transcript of record on appeal, and said exhibits need not be printed.

Dated May 3, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiffs.

McCLANAHAN & DERBY,
CHICKERY & GREGORY,
Attorneys for Defendant.

It is so ordered.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed May 4, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [269]

(Title of Court and Cause.)

(Praecipe for Transcript on Writ of Error.)

To the Clerk of said Court:

Sir: Please prepare a transcript in the above-entitled case on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and including therein the following:

1. Complaint.
2. Demurrer to complaint.
3. Order of Court overruling demurrer to complaint.
4. Answer.
5. Demurrer to certain defenses set forth in answer.
6. Plaintiffs' motion to strike out certain parts of answer.
7. Order of Court sustaining said demurrer to answer.
8. Findings of fact and conclusions of law.
9. Judgment.
10. Petition for new trial.
11. Order of Court denying petition for new trial.
12. Engrossed bill of exceptions.
13. Petition for writ of error.

14. Order allowing writ of error.
15. Bond.
16. Assignment of errors.
17. Writ of error and copy and proof of service.
18. Citation and copy and proof of service.
19. Praecept for transcript of record.

Also kindly transmit to said Circuit Court of Appeals, as original exhibits but not included within the transcript, the following documents: [270]
Defendant's Exhibits "B," "C," "D" and "E."

McCLANAHAN & DERBY,
CHICKERING & GREGORY,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 2, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [271]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,127.

W. LESLIE COMYN et al.,

Plaintiffs,

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
CO., a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, WALTER B. MALING, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing two hundred seventy-one (271) pages, numbered from 1 to 271, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$116.55; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 15th day of August, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court, Northern District of California. [272]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Southern Division of the Northern District of California, Second Division, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Douglas Fir Exploitation & Export Company, a corporation, plaintiff in error, and W. Leslie Comyn and Benjamin F. Mackall, copartners doing business under the firm name of Comyn, Mackall & Co., defendants in error, a manifest error hath happened, to the great damage of the said Douglas Fir Exploitation and Export Company, a corporation, plaintiff in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, **that** then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held,

that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable JOSEPH McKENNA, Senior Associate Justice of the Supreme Court of the United States, the 24th day of June, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal]

WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

ALLOWED BY:

_____.

Receipt of a copy of the within writ of error is hereby admitted this 24th day of June, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Defendants in Error.

[Endorsed]: No. 16,127. In the Southern Division of United States District Court for the Northern District of California, Second Division. Douglas Fir Exploitation & Export Company, a Corp., Plaintiff in Error, vs. W. Leslie Comyn and Benjamin F. Mackall, Copartners, etc., Defendants in Error. Writ of Error. Filed Jun. 25, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [273]

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [274]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to W. Leslie Comyn and Benjamin F. Mackall, Copartners Doing Business Under the Firm Name of Comyn, Mackall & Co., GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of

error duly issued and now on file in the clerk's office of the United States District Court for the Southern Division of the Northern District of California, Second Division, wherein Douglas Fir Exploitation & Export Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET,
United States District Judge for the Northern District of California, 2d Div'n, this 24th day of June,
A. D. 1921.

WM. C. VAN FLEET,
United States District Judge.

Receipt of a copy of the within Citation on Writ of Error is hereby admitted this 24th day of June, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Defendants in Error.

[Endorsed]: No. 16,127. In the Southern Division of United States District Court for the Northern District of California, Second Division. Douglas Fir Exploitation and Export Company, a Corporation, Plaintiff in Error, vs. W. Leslie Comyn and Benjamin F. Mackall, Copartners, etc., Defendants in Error. Citation on Writ of Error. Filed Jun. 25, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [275]

[Endorsed]: No. 3753. United States Circuit Court of Appeals for the Ninth Circuit. Douglas Fir Exploitation & Export Company, a Corporation, Plaintiff in Error, vs. W. Leslie Comyn and Benjamin F. Mackall, Copartners Doing Business Under the Firm Name of Comyn, Mackall & Company, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed August 17, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,127.

W. LESLIE COMYN and BENJAMIN F. MACK-
ALL, Copartners Doing Business Under the
Firm Name of COMYN, MACKALL & CO.,
Plaintiffs,

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
COMPANY, a Corporation,
Defendant.

**Order Extending Time to and Including August 24,
1921, to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR, it is hereby ORDERED that the time within which defendant and plaintiff in error may file the record of the above-entitled case in the Circuit Court of Appeals and docket said cause in said court is extended to and including the 24th day of August, 1921.

Dated: July 22d, 1921.

WM. W. MORROW,
U. S. Circuit Judge.

[Endorsed]: 3753. No. 16,127. In the Southern Division of the United States District Court, Northern District of California, Second Division. W. Leslie Comyn and Benjamin F. Mackall, Copartners Doing Business Under the Firm Name of Comyn, Mackall & Co., Plaintiffs, vs. Douglas Fir Exploitation & Export Company, a Corporation, Defendant. Order Extending Time for Docketing Case. Filed Jul. 22, 1921. F. D. Monckton, Clerk. Refiled Aug. 17, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Judicial Circuit.

No. 3753.

DOUGLAS FIR EXPLOITATION & EXPORT
COMPANY, a Corporation,

Plaintiff in Error,

vs.

W. LESLIE COMYN and BENJAMIN F. MACK-
ALL, Copartners Doing Business Under the
Firm Name of COMYN, MACKALL & CO.,
Defendants in Error.

**Stipulation Waiving Printing of Original Exhibits
and of Exhibit "A" Attached to Complaint.**

It is hereby stipulated and agreed that Defendant's Exhibits "B," "C," "D" and "E," sent up to the above-entitled court as original exhibits, and also the book marked "G List," attached to plaintiffs' complaint as Exhibit "A," need not be printed, but that the same may be considered as a part of the record even though not printed.

Dated, August 17th, 1921.

E. B. McCLANAHAN,
S. HASKET DERBY,
WARREN GREGORY,

Attorneys for Plaintiff in Error.

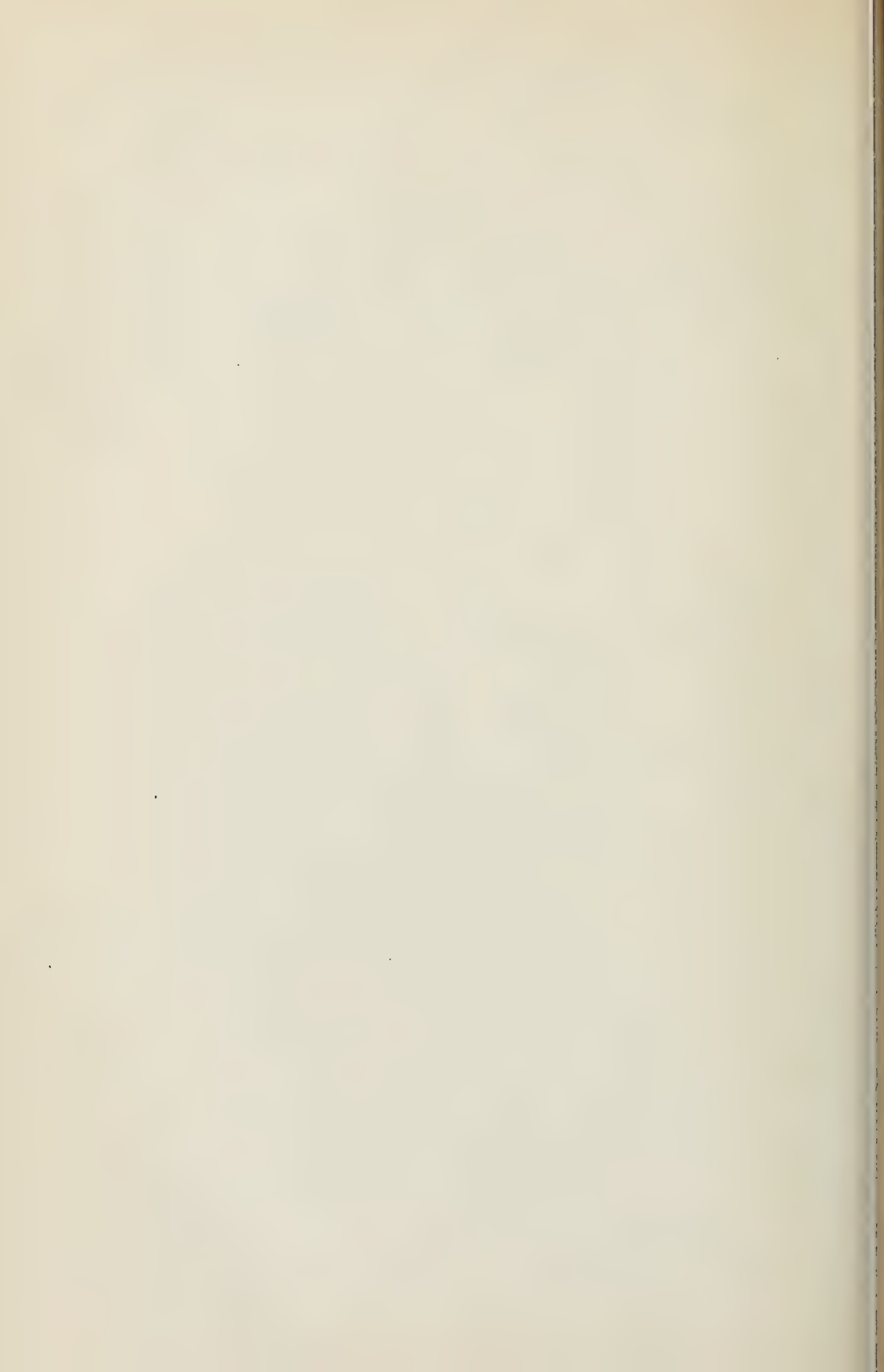
PILLSBURY, MADISON & SUTRO,

Attorneys for Defendants in Error.

So ordered.

WM. W. MORROW,
U. S. Circuit Judge.

[Endorsed]: No. 3753. In the United States Circuit Court of Appeals for the Ninth Judicial Circuit. Douglas Fir Exploitation & Export Co., a Corp., Plaintiff in Error, vs. W. Leslie Comyn and Benjamin F. Mackall, etc., Defendants in Error. Stipulation Waiving Printing of Original Exhibit "A" Attached to Complaint. Filed Aug. 18, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.



5
No. 3753

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

DOUGLAS FIR EXPLOITATION & EXPORT COMPANY
(a corporation),

Plaintiff in Error,

vs.

W. LESLIE COMYN and BENJAMIN F. MACKALL,
co-partners doing business under the firm name
of COMYN, MACKALL & COMPANY,

Defendants in Error.

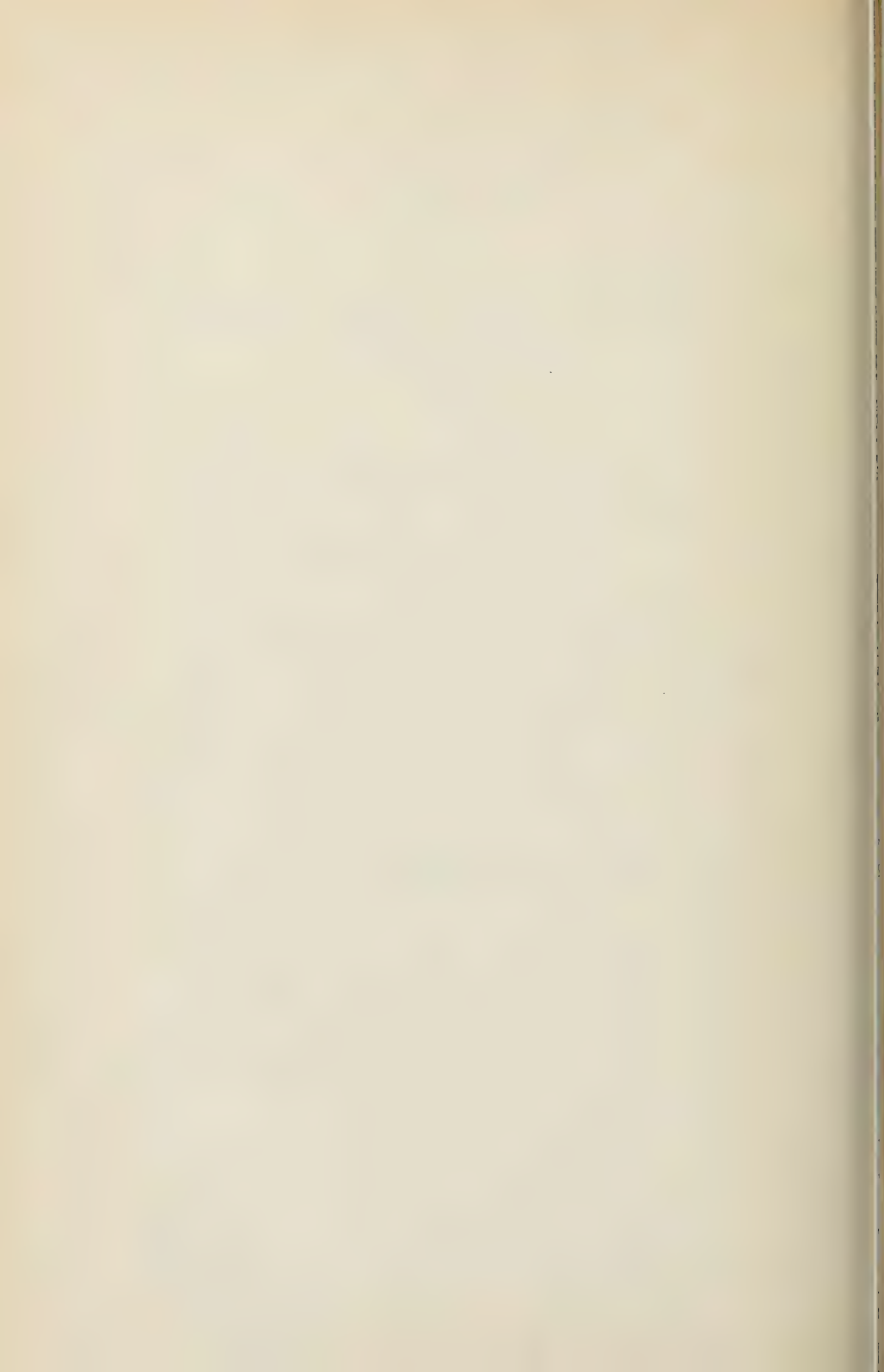
BRIEF FOR PLAINTIFF IN ERROR.

CHICKERING & GREGORY,
McCLANAHAN & DERBY,
Attorneys for Plaintiff in Error.

FILED

OCT 10 1921

F. D. MONCKTON,
CLERK



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No. 3753

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DOUGLAS FIR EXPLOITATION & EXPORT COMPANY
(a corporation),

Plaintiff in Error,

vs.

W. LESLIE COMYN and BENJAMIN F. MACKALL,
co-partners doing business under the firm name
of COMYN, MACKALL & COMPANY,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This controversy is in this court on Writ of Error from the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

The action is one for damages for alleged partial breach of contract and was tried jury waived. Defendants in error, who were the plaintiffs in the court below, had judgment against the plaintiff in error (defendant in the court below) for the sum of \$17,592.72 (Record, page 58). Throughout this discussion we

will refer to the parties as they were ranged in the trial court.

The contract alleged to have been breached by the defendant, the Douglas Fir Exploitation and Export Company, is set up in the complaint as being found in two documents, accepted and approved by the plaintiffs, shows an agreement to purchase four cargoes of fir lumber for four exporting vessels.

It was initiated by a letter dated November 2, 1916, from defendant to plaintiffs, which is correctly shown at pages 68 and 69 of the Record as "Plaintiffs' Exhibit No. 1". The other document, mentioned in the complaint as establishing the completed contract, was an "*Acknowledgment of Order*", so called, from the defendant, dated December 8, 1916 (plaintiffs' Exhibit No. 4, pages 82, 83 of Record). This "Acknowledgment of Order" is alleged to have been sent to the plaintiffs by the defendant on December 15, 1916, with the request that plaintiffs sign their acceptance of same, which was done on December 28, 1916.

These two documents alone forming the contract sued on, show (*inter alia*) the sale of a cargo for the schooner "W. H. Marston" of 1,300,000 feet of fir 15% more or less to suit the capacity of that vessel, with delivery and shipment to be made at Knappton, Washington, between October 1 and December 31, 1917. Further allegations of the complaint show that the plaintiffs in November 1917 prepared to take delivery of this fir by having barges and stevedores present at Knappton, but that defendant failed and refused to deliver the same.

The complaint was demurred to on the ground (*inter alia*) (a) that the presence of the schooner "W. H. Marston" at Knappton was a condition precedent to any delivery by defendant and the complaint did not show a compliance with said condition precedent; (b) that the complaint did not show that the schooner "W. H. Marston" was present at any time to take delivery of the lumber (Demurrer, Record pages 9-12). This point, thus early raised in the case is the meat of the controversy,—the schooner "W. H. Marston" was unable to and failed to make her agreed loading date and plaintiffs claim the right to take delivery of the lumber on barges instead of the named exporting vessel.

Defendant's demurrer to the complaint was overruled by Judge Van Fleet (Record pages 13, 14), and thereafter defendant filed its answer alleging, *inter alia*, that plaintiffs' written approval of the contract, initiated by defendant's letter of November 2, 1916, was delivered to defendant enclosed in a letter dated November 6, 1916 (defendant's Exhibit F, Record page 157), in which plaintiffs asked permission to substitute another exporting vessel for the "W. H. Marston" if they should find it convenient in the future to do so; and that this requested modification of the tentative contract was refused in an answering letter dated November 8, 1916 (defendant's Exhibit G, Record page 158). Defendant's answer further alleged that the contract was carried out, in part, by a delivery of a cargo to the schooner "W. H. Talbot", within her delivery date, and by a delivery of a cargo to the schooner

“Golden Shore”, within her delivery date (this latter being one of the two exporting vessels subsequently named by plaintiffs as the receiving medium for part of the lumber), and that the reason said contract was not carried out as to the cargoes for the schooner “W. H. Marston” and the schooner “Wm. Borden” (this latter being the other vessel which was subsequently named by the plaintiffs), was that neither of these vessels were present at their agreed loading ports any time between October 1 and December 31, 1917.

After alleging other material matters, the answer, in conclusion, sets up five separately numbered defenses (Record pages 26-37). To this answer *plaintiffs* filed a demurrer and a motion to strike (Record pages 43-50).

Judge Van Fleet in an oral decision (Record pages 51, 52), denied in toto the motion to strike and sustained the demurrer only as it was directed to the concluding five separately numbered defenses. The case then went to trial before *Judge Bean*, jury waived, after which that court made its findings of fact and conclusions of law (Record page 53), and filed its memorandum opinion (Record page 59) upon which a final judgment was given for \$17,592.72 in favor of plaintiffs with costs (Record page 58). Thereafter defendant filed its petition for a new trial (Record page 61), which was denied and this writ of error was then sued out and perfected (Record pages 320-328).

**DEFENDANT'S CONTENTIONS UNDER ITS
ASSIGNMENT OF ERRORS.**

It is not the intention of the defendant (plaintiff in error) to urge upon the court all of the assignments of error shown in the record because we believe it will be unnecessary as those which we shall urge are sufficient in themselves to require a reversal of the judgment which is the subject of this writ of error. The contentions which we make are as follows:

First Contention.

We contend that the court erred in overruling defendant's demurrer to plaintiffs' complaint. Furthermore, Judge Van Fleet's ruling on plaintiffs' demurrer to the defendant's answer and motion to strike, clearly showed that the court took a changed view of the case after the answer had been filed, amounting nearly to a reversal of the ruling on the demurrer to the complaint, and it was reversible error for the trial court to follow the ruling of Judge Van Fleet on the demurrer to the complaint. That it was reversible error for the trial court to recognize plaintiffs' contract with the Charles Nelson Co., a contract with which defendant had nothing to do, and to link consideration of the latter with the contract in suit. (Assignment of errors Nos. I, VIII, X, XII, XXI, XXVI, XXVIII.)

Second Contention.

We contend that the trial court erred in sustaining plaintiffs' demurrer to the separate defenses set up in articles I, II, III, IV and V of the answer, and at the trial in refusing to allow proof to be made of those de-

fenses. The principal of those defenses being shown by the allegations of Article I to the effect that at the time the sale in question was made, it was known to the plaintiffs that defendant corporation was organized for the purpose of making sales of Douglas fir lumber for immediate exportation to foreign countries; that it had no power to sell said fir and make delivery of the same in such way as to give the buyer the discretion to export it, and that all the terms and conditions set up in the instant contract, bearing on the "W. H. Marston's" cargo, were known to be intended as safeguards and guarantees that said fir would pass from defendant's into plaintiffs' possession in such manner as to make it imperative that the same be exported and that plaintiffs should be denied the power or right of dealing with it in any other way. That if a delivery of said fir could possibly be made to a barge or barges, such a delivery would place it within plaintiffs' legal right and power to dispose of it as they might see fit and in such manner as to make the sale a violation of defendant's charter and of the laws of the United States. (Assignment of errors, III, XV, 9th ground, XVII, XIX, 9th ground.)

Third Contention.

The cases on the subject of sales made "f.o.b." and "f.a.s." In the light of the facts of the case at bar, there can be no distinction made in the meaning of these two trade terms, as used in the instant contract. (Assignment of errors, VIII, X, XIX, XX, XXVI.)

Fourth Contention.

We contend that the court erred in not holding that the sale in question was of a *cargo* to suit the capacity of the "W. H. Marston," estimated to be 1300 M feet, 15% more or less, and also erred in holding that the sale was for 1300 M feet without reference to the "W. H. Marston" as a receiving medium, and that delivery of said 1300 M feet of lumber could have been taken on barges or anything else besides the vessel. (Assignment of errors Nos. VI, XXVII, XIX, 7th ground.)

Fifth Contention.

The time of delivery. We contend that the time of the cargo's delivery is fixed by the time of the actual arrival of the "W. H. Marston" at the loading dock, between October 1 and December 31, 1917. (Assignment of errors Nos. XV and XIX, grounds 8th and 12th, and XXVIII.)

Sixth Contention.

The place of delivery. We contend that the naming of the "W. H. Marston", also conditioned the place of the delivery of the lumber, in that it was such place at the Knappton mill wharf at which defendant could exercise its option of making delivery "f.o.b." mill wharf Knappton, within reach of vessel's tackle and/or on barges "a.s.t." mill wharf Knappton. (Assignment of errors, XV and XIX, 8th and 12th grounds, and XXVIII.)

Seventh Contention.

The quantity of lumber sold. We contend that the testimony is all to the effect that in cargo sales to suit

the capacity of a named vessel, it is impossible to know the exact amount of such sales until the vessel is actually loaded. (Assignment of errors Nos. VIII, XV, and XIX, 1st, 2nd, 3rd and 4th grounds.)

Eighth Contention.

The benefits accruing to defendant through the naming of the "W. H. Marston" as the receiving medium for the lumber.

Ninth Contention.

We contend lastly that it was error for the trial court to refuse to deduct 15% from the final judgment of \$17,592.72, thereby making such judgment the minimum in amount. (Assignment of errors No. IX.)

Argument.

FIRST CONTENTION.

WE CONTEND THAT THE COURT ERRED IN OVERRULING DEFENDANT'S DEMURRER TO PLAINTIFFS' COMPLAINT. FURTHERMORE JUDGE VAN FLEET'S RULING ON PLAINTIFFS' DEMURRER TO DEFENDANT'S ANSWER AND MOTION TO STRIKE, CLEARLY SHOWED THAT THE COURT TOOK A CHANGED VIEW OF THE CASE AFTER THE ANSWER HAD BEEN FILED, AMOUNTING NEARLY TO A REVERSAL OF THE RULING ON THE DEMURRER TO THE COMPLAINT, AND IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO FOLLOW THE RULING OF JUDGE VAN FLEET ON THE DEMURRER TO THE COMPLAINT; THAT IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO RECOGNIZE PLAINTIFFS' CONTRACT WITH THE CHARLES NELSON CO., A CONTRACT WITH WHICH DEFENDANT HAD NOTHING TO DO, AND TO LINK CONSIDERATION OF THE LATTER WITH THE CONTRACT IN SUIT. (ASSIGNMENT OF ERRORS NOS. 1, VIII, X, XII, XXI, XXVI AND XXVIII.)

In the court's memorandum opinion (Record, page 59), it is said that the single question for decision "is whether the failure of plaintiff to have the "Marston" at the mill wharf ready to receive cargo within the delivery dates specified in the contract relieved the defendant from the obligation to make delivery as demanded",—namely, on barges, "in other words, whether the plaintiff could legally require delivery without furnishing the named vessel as the receiving medium."

Defendant's demurrer to the complaint touching the absence of an allegation showing the presence of the "W. H. Marston" at the Knappton mill dock, ready to receive cargo, was fully argued and briefed in the lower

court and the demurrer was overruled by Judge Van Fleet. Upon the filing of defendant's answer, its defensive allegations touching the "W. H. Marston's" absence from the mill dock, was demurred to by plaintiffs, fully argued and briefed and also overruled by Judge Van Fleet. The contradictory situation thus brought about by these two decisions on the pleadings is of significance in view of the fact that, in the said memorandum opinion, Judge Bean expressly relies upon and follows the law and ruling announced in Judge Van Fleet's decision on the demurrer to the complaint, when he says:

"This question in substance was decided by Judge Van Fleet adversely to defendant on demurrer to the complaint. In his opinion I fully concur."

In view of the fact that this decision of Judge Van Fleet's overruling the demurrer to the complaint is also referred to by the District Court of Appeal of California in *Meyer v. Sullivan*, 40 Cal. App. 723, it is appropriate that this court should be fully advised of defendant's contention that both these courts have erred in following Judge Van Fleet at this demurrer stage of the pleadings, for the reason that when defendant's answer was filed and there was set up the fuller facts of the case; Judge Van Fleet, in effect, reversed his first opinion by allowing defendant to allege in its answer, *as a defense*, the failure of plaintiffs to have the "W. H. Marston" present to take delivery of the lumber sold as her cargo. That this court may see clearly the importance placed by Judge Van Fleet on the new and fuller allegations of defendant's answer; we herewith

cite some of them which plaintiffs' demurrer and motion to strike unsuccessfully attacked:

Plaintiff's motion to strike the following allegations of the answer was denied.

"Furthermore defendant alleges, that the use of the phrase 'f.a.s. mill wharves', in the instrument referred to in said paragraph III, was understood by both plaintiffs and defendant to require the actual presence, at a mill wharf, to be designated by defendant, of a sailing vessel to receive at her tackles, delivery of the cargo of fir agreed to be sold." (Answer, Record page 16.)

* * *

"That said 'G' List is a standard schedule solely of prices of Douglas fir lumber, bargained for or sold to be exported only, and that said 'G' list furnishes the basis for the quotation of prices for Douglas fir for export shipment only, to be delivered only to vessels at lumber mills within reach of such vessel's tackles, and defendant alleges that at all times mentioned, in said complaint, said 'G' List was so known and understood by both plaintiffs and defendant." (Id. 17.)

* * *

"Defendant further alleges that among the terms and conditions of said 'G' List which were understood and accepted by both plaintiffs and defendant as forming a part of the contract sued on herein, is one providing that the prices in said 'G' List are based on delivery of the fir by the seller to sailing vessels, and defendant alleges that the prices in the contract sued on were based solely on delivery of a cargo of fir to the sailing vessel "W. H. Marston", and that this was at all times the understanding and agreement of both plaintiffs and defendant." (Id. 18.)

* * *

"—and that it in fact did, in accordance with said contract, deliver to the schooner 'W. H. Talbot',

at her tackles, at a designated mill wharf, the full cargo of 'fir' called for in said contract; that in accordance with said contract it delivered to the schooner 'Golden Shore', at her tackles, at a designated mill wharf (she being one of the vessels which, as required by said contract, plaintiffs subsequently named), the full cargo of 'fir' called for in said contract; that although plaintiffs named, as required by said contract, the schooner 'Wm. Borden' as the fourth vessel, the cargo of 'fir' contracted for that vessel was not delivered by defendant at her tackles, or at all, because of the failure of plaintiffs to have the said 'Wm. Borden' at the agreed loading berth at the agreed date, and defendant alleges that the contract in so far as it applied to both the schooners 'W. H. Talbot' and 'Golden Shore' was fulfilled in strict accord with its terms, while that portion of said contract which applied to the schooners 'W. H. Marston' and 'Wm. Borden' was cancelled by defendant for the same reason, namely: the failure of plaintiffs to have either of said last named vessels at the designated loading place within the agreed and specified loading time." (Id. 24.)

* * *

Plaintiffs not only moved to strike but also demurred to the following allegation of the answer and their motion to strike was *denied* and their demurrer *overruled*.

"And defendant alleges in this connection that it was never understood or agreed by plaintiffs or defendant at the time said contract was entered into, or at any other time, that a barge or barges might, at the option of plaintiffs, be furnished and used by plaintiffs in taking delivery of said fir intended for and sold as a cargo to the said schooner 'W. H. Marston', but on the contrary it was the understanding and agreement of the parties and so expressed in said contract, that the option was

given to defendant to make delivery of said cargo at the tackles of the said 'W. H. Marston' from either the mill wharf or from barges alongside, or from both said mill wharf and barges, and that this privilege and provision of the contract was inserted wholly for the benefit of defendant." (Id. 22, 23.)

Plaintiffs also *demurred* to the following allegation of defendant's answer and their demurrer was *overruled*.

"Defendant as a further separate answer and defense to this action alleges that the said schooner 'W. H. Marston' was never at the mill wharf of the Knappton Mills and Lumber Company, at said Knappton, Washington, at any time within the period extending from the 1st day of October to the 31st day of December, 1917, inclusive, and as a consequence it was never within the power of defendant and/or the said Knappton Mills and Lumber Company to deliver to said vessel a cargo of 'fir' on the mill wharf of said Company, free alongside said vessel, or free on board said mill wharf within reach of said vessel's tackles, or on barges at said vessel's tackles at said mill wharf." (Id. 24, 25.)

Furthermore, it cannot be denied that Judge Van Fleet in rendering his oral decision (which appears not to have been preserved), on plaintiffs' attack on defendant's five separately pleaded defenses, commencing at page 26 of the Record, denied the motion to strike and granted the demurrer with the statement, in effect, that these five separately pleaded defenses were statements of evidentiary matter properly subject to proof but improperly pleaded.

From Judge Van Fleet's view of these allegations of the answer above quoted (and there are others of equal

significance which we have not referred to), it should be clear that after defendant's answer had been filed; the court's view of its defense which required the actual presence of the "Marston" to receive the lumber intended as her cargo,—had *completely changed* since passing on the demurrer to the complaint, and had Judge Bean properly concurred with Judge Van Fleet, he would have followed him in his later and more enlightened view of the question, and this would have made it impossible to hold that he had decided the question "adversely to defendant".

There can be no fitter place than here to briefly discuss the case cited by Judge Bean in support of the above finding and a case which was greatly relied upon by plaintiffs at the trial.

Meyer v. Sullivan, 40 Cal. App. 723; 731, 732.

As may have been inferred, the interesting thing about this California case is that it too cites Judge Van Fleet's ruling on defendant's demurrer to the complaint in the case at bar, but it says nothing about the same court's ruling on *plaintiffs'* demurrer to the answer and motion to strike, for the obvious reason that *Meyer v. Sullivan* was decided April 19, 1919, and it was not until nearly three months thereafter, July 14th, that Judge Van Fleet rendered his decision on plaintiffs' demurrer and motion to strike. Had *Meyer v. Sullivan* been decided *after* Judge Van Fleet's second decision, something more and different would have to be said about the case at bar. Furthermore, it cannot be denied by counsel that, while Judge Van Fleet had under consideration plaintiffs' attack on defendant's

answer in the case at bar, he was *specifically and fully* advised, that his ruling on the demurrer to the complaint had been “followed” in *Meyer v. Sullivan*. The reason *Meyer v. Sullivan* was not followed by Judge Van Fleet is that its bearing on the facts of the case at bar, *as amplified by defendant’s answer*, is nil. This we can easily show.

The contract in the Sullivan case was to deliver a certain quantity of wheat at “\$1.43 $\frac{1}{3}$ per 100 lbs. f.o.b. *Kosmos steamer Seattle*”. The court expressly held that in such an agreement the term “f.o.b.” was not connected with the place of delivery but was used in connection with the price only and did not, therefore, require the presence of the steamer. The opinion must be read with this fact in mind, for if the term “f.o.b. *Kosmos steamer Seattle*”, as a matter of construction, was used with reference to the price only and not as fixing the exact place of delivery; then, obviously, the presence of the ship could have been waived by the buyer.

Moreover, there is a marked distinction between a contract calling for a cargo to suit the capacity of a named vessel,—a capacity cargo, and one which calls for simply a certain quantity of goods measured in hundreds of pounds. Furthermore, it is perfectly clear that the court in *Meyer v. Sullivan* had no idea that the particular provision which it quotes from the instant contract; “*Delivery f.o.b. mill wharf, Knappton, within reach of vessel’s tackles and/or on barges a.s.t. (at ship’s tackles), mill wharf, Knappton, Wash.*”, was an optional mode of making delivery reserved by the

seller (plaintiff's Ex. No. 5, Record page 85; Baxter Record page 228). Had this been understood, it is not difficult to see that it would have raised the question in the court's mind of whether or no, an option, given to the seller, of alternative methods of making a delivery of a cargo, can be overridden or destroyed by the buyer without the seller's consent.

In conclusion, therefore, of this phase of the discussion, we hope that we have made clear to the court, that (a) there was error in Judge Bean's memorandum opinion as well as in the opinion in *Meyer v. Sullivan*, based, *as both were*, on the early, if not premature, ruling of Judge Van Fleet on the demurrer to the complaint, which ruling Judge Van Fleet found it necessary later to reverse after the fuller facts of the case were revealed by defendant's answer.

While it doubtless would be a cause of satisfaction to have this court find error in the overruling of defendant's demurrer to the complaint (assignment of errors No. I), nevertheless, there must be a discussion of the whole case and it would, therefore, be unprofitable to divide too conclusively the argument into periods before and after the filing of defendant's answer. This latter pleading placed before the court not only the *completed* contract but also the relevant and material facts bearing upon its proper construction, and a discussion of the law of the case, governing the incomplete allegations of the complaint would be idle, if it is to be followed by a discussion of all the law and material facts revealed by both complaint and answer.

Not only did Judge Bean have before him the allegations of the complaint and answer, but he went farther and based his decision on *a prior contract* which was not pleaded and with which the defendant had nothing to do.

In its consideration of the instant contract, the trial court has stepped outside the pleadings and has improperly linked to its consideration of the instant contract a prior cancelled contract between other parties, covering a different subject matter and embodying different terms. Having done this, it finds that the instant contract was "*confirmatory of and by reason of*" such prior cancelled contract, and that in this latter "*no receiving vessel was named*" (Findings of Fact and Conclusions of Law, I, Record page 53).

There is no need for uncertainty as to the identity of the contract. The complaint itself says it was entered into "in manner as follows: defendant wrote to plaintiffs a letter as follows, to wit:

" 'San Francisco, Cal., November 2, 1916.
Messrs. Comyn, Mackall & Co.,
310 California St.,
City.

Gentlemen: *Sold prior to October 11, 1916.*

This will confirm sale to you of four cargoes
Fir f.a.s. mill wharves as follows:

"W. H. Marston" 1300 M October to December
1917

"W. H. Talbot" 1000 M October to December
1917

(Quotations subject to change without notice.
All agreements are contingent upon the acts of
God, riots, strikes, lock-outs, fires, floods, acci-

dents, inability to secure cars, transportation or other causes of delay beyond our control.) and two of your own vessels to be named later, with a combined capacity of 1450 M, both for loading October to December 1917, cargo to be furnished f.a.s. vessel at loading ports at 60 M daily in Puget Sound, Columbia or Willamette Rivers, Gray's Harbor and Willapa at our option, but one loading port only for each vessel, loading port to be named by us in ample time to give vessel instructions before leaving her next previous port of call.

Tally and inspection by Pacific Lumber Inspection Bureau at loading port. Certificate to be furnished and to be final. Price \$9.50 base "G" list less $2\frac{1}{2}\%$, $2\frac{1}{2}\%$ cash. Marking if required, distinguishing mark at 10¢ per M. extra cost.

Written in duplicate. Please approve and return one copy.

Very truly yours,

Douglas Fir Exploitation & Export Co.,
By A. A. Baxter,
General Manager.' "

It is then alleged that plaintiffs endorsed on one copy of this letter their written approval and delivered said endorsed copy to defendant.

It is then alleged:

"On December 15, 1916, defendant notified plaintiffs that it would deliver the 1,300,000 feet of 'Fir' specified in said contract as a cargo for the 'W. H. Marston' at the mill wharf of the Knapp-ton Mill & Lumber Company, at Knappton, Washington, which said wharf is situated on the Columbia River. On said 15th day of December, 1916, defendant sent plaintiffs an instrument entitled 'Acknowledgement of Order', in words and figures as follows, to wit:

ACKNOWLEDGMENT OF ORDER.

Douglas Fir Exploitation & Export Co.,
260 California St.,
San Francisco, Cal.

Date December 8, 1916.

Our No. 38 page 1.

Knappton Mills & Lumber Company.

Your Order No. Dated

Sold to Comyn, Mackall & Company.

For account of

to be delivered at

Knappton, Wash.

For reshipment to

Time of shipment

October to December, 1917.

Time of delivery

ditto.

Mill Tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per this confirmation irrespective of original order unless advised to the contrary by you.

SCH. 'W. H. MARSTON'

1,300,000 feet B. M. 15% more or less to suit capacity of vessel.

Price: \$9.50 Base 'G' List, Less 2½% & 2½% for cash.

Destination: Australia (usual Australian specifications)

Grade: As per 'G' List, P. L. I. B. Certificate to be furnished.

Delivery: 60 M feet per working day or pay demurrage as provided by Charter Party.

Marking: Marking if ordered, 10 cents per M, net cash.

Shipment: October to December, 1917.

Terms and conditions: As per 'G' List.

Notes: This price is for delivery f.o.b. mill wharf, Knappton, within reach of vessel's tackles and/or on barges a.s.t. mill wharf, Knappton, Wash.'

and defendant on said 15th day of December, 1916, requested plaintiffs to sign their acceptance of said order, and thereupon plaintiffs signed their acceptance of said order and forthwith forward said signed acceptance of said order to defendant.'" (Record, pages 3-6.)

Defendant's answer admits the writing of the letter of November 2, 1916, admits its approval and delivery of the copy to defendant but further alleges that such approved copy was delivered enclosed in a letter from plaintiffs dated *November 6, 1916* (Answer, Article III, Record, pages 14, 15).

The answer further admits that there was sent to plaintiffs the instrument set forth in Article IV of the complaint, entitled "Acknowledgement of Order" and then alleges that this instrument was sent to plaintiffs enclosed in a letter dated December 15, 1916 informing plaintiffs that the order for the lumber for the cargo for the schooner "W. H. Marston" had been placed with the Knappton Mills and Lumber Company and requesting plaintiffs to sign the accepted copy of this order and return the same to defendant and that this was done. (Id. page 15.)

At the trial the letter of November 6, 1916, in which plaintiffs enclosed defendant's letter of November 2nd, was introduced together with defendant's answering letter of November 8th and these two letters, we submit, are links in the correspondence that went finally to

make the completed contract. These letters read as follows:

“November Sixth, 1916.

Douglas Fir Exploitation & Export Co.,
260 California Street,
San Francisco, California.

Dear Sirs:

We have to acknowledge receipt of your sale note covering 3500 M' 15% more or less October to December, 1917. We now take pleasure in approving same as per enclosed. It is understood that the vessels named in your sale note are not to load above the bridges on the Columbia River, and with regard to the balance of the purchase, it is understood that the same cannot, under any circumstances, be shipped from the Portland Lumber Company. We have also very great prejudice against shipping from the Inman Poulsen, Clark & Wilson and Peninsula Mills, and would much appreciate your not stemming us with those mills. We presume also that you would have no objection if it was found convenient, to our substituting other vessels in place of the 'Marston' or the 'Talbot'.

Very truly yours,

Comyn, Mackall & Co.,
Per Claude Daly.”

(Defendant's Ex. “F” Record, page 157.)

“November 8, 1916.

Messrs. Comyn, Mackall & Co.,
310 California St.,
San Francisco, California.

Gentlemen:

We acknowledge yours of the 6th and confirm your understanding that none of these vessels will be required to load above the bridges at Portland which, in itself, would exclude the Portland Lumber Company; but we will also agree that none of them are to load at the mill at Portland.

The other mills mentioned by you—Inman Poulsen, Clark & Wilson and Peninsula Lumber Company—are not interested in our company, but if they should later come into the company, Inman Poulsen would still be excluded on account of being above the bridges. This then would leave only Clark & Wilson and the Peninsula Mills as possibilities and we would prefer to keep them in that position, as it might be very necessary for us to load one of your vessels at one of these mills.

As regards substituting other vessels for 'Marston' and the 'Talbot'; as these vessels are now matters of record in the contract, we would prefer not to have any agreement giving you the option of naming other vessels. If, however, you have now or will have at any future time other vessels in like position and for your convenience wish to substitute them for either one or both of these vessels, we will be pleased to go into the matter with you with a view of meeting your necessities.

Very truly yours,

Douglas Fir Exploitation & Export Co.,

By.....General Manager."

(Defendant's Ex. "G", Record page 158.)

No correspondence between the parties is shown after the letters of November 6th and 8th until defendant's letter of December 15, 1916, enclosing the "Acknowledgement of Order" dated December 8, 1916, and, therefore, in this correspondence is found the contract which the lower court was called upon to construe to determine whether or no the actual presence of the schooner "W. H. Marston" at the Knappton mill wharf was a condition precedent to a delivery of the lumber by the defendant either on the wharf at the ship's tackle or on barges at the ship's tackle.

While it may have been proper for the trial court to have permitted it to be shown what the expression found in the letter of November 2nd,—“*Sold prior to October 11, 1916*”, meant; nevertheless when such showing revealed a contract between plaintiffs and another party having nothing in common with the instant contract; the matter should have been dropped, instead of which the court’s findings show that its conclusion and judgment was unquestionably based, in part at least, on a consideration of this prior cancelled contract which made no reference to a vessel as a receiving medium. The question of the right of the plaintiffs in the instant contract to waive the specifically agreed vessel as a receiving medium without the defendant’s consent and to substitute therefor barges could not possibly have been affected by plaintiffs’ prior cancelled contract with the Charles Nelson Company, and we submit it to be reversible error for the court to have considered it.

SECOND CONTENTION.

WE CONTEND THAT THE TRIAL COURT ERRED IN SUSTAINING PLAINTIFFS' DEMURRER TO THE SEPARATE DEFENSES SET UP IN ARTICLES I, II, III, IV, AND V OF THE ANSWER AND AT THE TRIAL, IN REFUSING TO ALLOW PROOF TO BE MADE OF THOSE DEFENSES, THE PRINCIPAL OF THESE DEFENSES BEING SHOWN BY THE ALLEGATIONS OF ARTICLE I, TO THE EFFECT THAT AT THE TIME THE SALE IN QUESTION WAS MADE, IT WAS KNOWN TO THE PLAINTIFFS THAT DEFENDANT CORPORATION WAS ORGANIZED FOR THE PURPOSE OF MAKING SALES OF DOUGLAS FIR LUMBER FOR IMMEDIATE EXPORTATION TO FOREIGN COUNTRIES; THAT IT HAD NO POWER TO SELL SAID FIR AND MAKE DELIVERY OF SAME IN SUCH WAY AS TO GIVE THE BUYER THE DISCRETION TO EXPORT IT, AND THAT ALL THE TERMS AND CONDITIONS SET UP IN THE INSTANT CONTRACT, BEARING ON THE "W. H. MARSTON'S" CARGO, WERE KNOWN TO BE INTENDED AS SAFEGUARDS AND GUARANTEES THAT SAID FIR WOULD PASS FROM DEFENDANT'S INTO PLAINTIFFS' POSSESSION IN SUCH MANNER AS TO MAKE IT IMPERATIVE THAT THE SAME BE EXPORTED AND THAT PLAINTIFFS SHOULD BE DENIED THE POWER OR RIGHT OF DEALING WITH IT IN ANY OTHER WAY. THAT IF A DELIVERY OF SAID FIR COULD POSSIBLY BE MADE TO A BARGE OR BARGES, SUCH A DELIVERY WOULD PLACE IT WITHIN PLAINTIFFS' LEGAL RIGHT AND POWER TO DISPOSE OF IT AS THEY MIGHT SEE FIT, AND IN SUCH MANNER AS TO MAKE THE SALE A VIOLATION OF DEFENDANT'S CHARTER AND OF THE LAWS OF THE UNITED STATES. (ASSIGNMENT OF ERRORS NOS. III, XV, AND XIX, 9TH GROUND.)

Originally, it was the contention of the plaintiffs that the lumber bargained for, *under the express terms of the contract*, was deliverable to the buyers on barges to be furnished by the buyers, and that its future disposition after such delivery was of no concern to the seller. This view, however, gradually changed during the progress of the trial until the contention was reached

that while it was the original intention of both parties that the lumber should be taken on board the "W. H. Marston" for export, it was immaterial to the seller *when* this was done, and that the delivery date of the contract did not necessarily apply to the time of the lumber's receipt *by the vessel* but was applicable to the time of its being placed on the mill wharf irrespective of the presence at the wharf of the "W. H. Marston". In other words, that if the buyers expressed their desire, a delivery during the agreed time, could be made for or to some other medium than the "W. H. Marston" and it would be immaterial that such receiving medium should be temporary,—immaterial that the lumber should be held on such temporary medium to await the arrival of the belated "Marston".

On the other hand, it has always been defendant's contention that the actual presence at the mill wharf of the "W. H. Marston", within the time provided by the contract, was a condition precedent to a delivery of the lumber, at that vessel's tackles, on the mill wharf, and/or on barges at the mill wharf. It has been defendant's contention that the actual presence of the "W. H. Marston" to receive delivery of the lumber sold to be exported, was a requirement of the contract affecting the subject matter of the sale, as well as the time, place and mode of its delivery, and that for each of these reasons the buyers (plaintiffs) were denied the right of waiving such requirement without the consent of the seller.

It is apparent from the correspondence, affecting the formation of the contract, that the question of substi-

tuting another *vessel* for the "W. H. Marston" as a receiving medium, was discussed and settled at the outset by the parties and that the instrument of final confirmation, being the so-called "Acknowledgement of Order", was *executed* with that question of the buyers' right of substitution clearly settled *against such right*. The request was made in the buyers' letter of November 6th, was denied in the seller's letter of November 8th, and with the matter so disposed of, the final "Acknowledgement of Order" was approved by the buyers *December 28, 1916* (plaintiffs Ex. No. 4, Record page 83). The right now claimed by the plaintiffs of substituting barges for the "W. H. Marston", or of doing away entirely with a specifically agreed receiving medium; is clearly of greater import to the defendant than was the right of substituting another vessel which was denied them, for delivery to a substitute vessel might be for export, but a delivery to a barge would carry no such inference. And, if in the signing of the "Acknowledgement of Order" there is found an acquiescence in the construction which denies the right of the plaintiffs to substitute another *vessel* for the "W. H. Marston" without defendant's consent,—certainly such an agreed construction should be conclusive of the claim of a right to substitute a *barge*, without the defendant's consent.

Let us, however, pass for the moment this question of the early construction placed upon the contract by the parties themselves and look at the matter from another view point. Was the "W. H. Marston", and were all the matters and things necessarily connected

with this exporting medium, placed in the contract *for the sole benefit of the plaintiffs* and, therefore, matters and things which plaintiffs could expunge from the contract *without the defendant's consent?*

In order to know what these things were and to determine their importance it will be in order to enumerate them so that the situation may be intelligently understood. Are the following matters necessarily connected with the "W. H. Marston" as an exporting vessel, inserted in the instant contract solely for the plaintiffs' benefit so that they may be expunged by them without the necessity of securing the seller's consent?

(1) All reference to "4 cargoes", which would leave the contract simply an agreement to sell 3,750,000 feet of lumber;

(2) All reference to "f.a.s. vessel loading ports" or "f.a.s. 'Marston', Mill Wharf,";

(3) All reference to "W. H. Marston", "W. H. Tablot", and two other vessels belonging to the buyers to be named later;

(4) All reference to the estimated carrying capacity of these respective vessels, to wit: 1,300,000 feet, 1,000,000 feet, 1,450,000 feet;

(5) All reference to separate "loading ports" for each of the four vessels;

(6) All reference to "Australia", as the destination of the "W. H. Marston";

(7) All reference to "vessel or vessels" (there are six of such references in the contract itself, not to speak

of many more found in Exhibit "A" attached to the complaint);

(8) All reference to "15% more or less to suit capacity of vessel";

(9) All reference to notice of "loading ports" being given "in time to give vessel instructions before leaving her next previous port of call";

(10) All reference to "inspection and tally" by the P. L. I. B. (Exhibit "A" attached to the complaint shows this bureau to be for the inspection of cargoes intended to be loaded on exporting vessels);

(11) All reference to any "certificate" and to its being "final"; (Exhibit "A" attached to the complaint shows this certificate to be furnished only after the "completion of the loading of the vessel");

(12) All reference to "G" list (Exhibit "A" attached to the complaint shows this list to be "a standard schedule of prices, dimensions, grading rules, etc., of Douglas Fir lumber delivered to ship at Mills for export shipment", and provides that its prices are based on delivery to sailing vessels and that unless otherwise agreed to "delivery will be made to ships * * * within reach of ship's tackles";

(13) All reference to "a daily" delivery of "60 M feet per working day"; (delivery under the changed contract would be made in solido as one concluded transaction and not continuous, day by day, at a fixed rate suiting the dexterity of the vessel in handling and loading);

(14) All reference to "demurrage" and to "charter party rate of demurrage";

(15) All reference to a delivery "a.s.t" (at ship's tackles), or "within reach of vessel's tackles" or "this price is for delivery", etc.

(16) All reference to "barges" or a delivery on barges.

The elimination of the foregoing would leave but little of the instant contract. Such omissions would so mutilate and change the instrument as to leave it no more than a mere agreement to sell 3,750,000 feet of lumber to be delivered, in solido, on the mill wharves to be designated between October and December, 1917, at the base price of \$9.50 per M feet. The effect of such omissions would be to destroy the sales important export characteristics and make it the right of the buyers to take possession in any way they chose and thereafter deal with the lumber as they saw fit. The exercise of such a right would make the sale illegal and violative of defendant's charter. We submit that the documents constituting this contract show a clearly expressed purpose of providing a sure and certain guarantee by the use of the very words and terms in question, that the lumber should be put on board an *exporting* vessel for "*delivery*" and "*shipment*" to Australia between October 1 and December 31, 1917. We do not hesitate to affirm that each of the terms set forth tends to show such purpose while combined they constitute an assurance as clear as words of agreement can, that such intent would be carried out.

We pass from the enumeration of these terms and phrases, which may well be omitted if plaintiffs' construction is to be accepted, with the inquiry made by the court in another case, which seems relevant:

“If the agreement is merely for the sale of 400 tons of paper, why were so many words employed, which the parties must once have thought possessed of meaning, and why are they now to be cast aside?”

National Pub. Co. v. International Paper Co., 269
Fed. Rep. 903, 905.

The allegations of the first of defendant's separate defenses commencing at page 26 of the Record, were intended to show the legal inability of defendant to enter into a contract which by its terms could be construed as a sale of lumber for any other purpose than its immediate export, or a delivery and shipment that would give the buyers the *discretionary* power to export it. The facts of this separate defense are alleged to have been known to the plaintiffs and that all the terms and conditions touching the subject of the lumber's exportation were intended as safeguards and guarantees that it would pass into the possession of plaintiffs in such manner as to make it imperative that it would be exported. A delivery to a barge would give plaintiffs the power and right to do with it as they might see fit, including the right of disposing of the lumber in such manner as to make defendant's sale a violation of its charter and of the laws of the United States.

Section 1860 of the Code of Civil Procedure of this State provides as follows:

“THE CIRCUMSTANCES TO BE CONSIDERED. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.”

It is true that Section 1856 of the Code provides that an agreement reduced to writing is to be deemed the whole, but there is this saving clause:

“But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in Section Eighteen Hundred and Sixty or to explain an extrinsic ambiguity * * * ”

The point to be made in showing the circumstances under which the sale was made, which defendant offered to do, is not whether or no defendant was lawfully doing business but rather that plaintiffs knew that it was doing only an export business (in anticipation of the passage of a certain law) with the tacit consent of the Federal Trade Commission. Under the circumstances then would it not be logical to assume that every intendment of the parties would be against making a contract which would be violative of the law by which in its expected passage, defendant expected to be given the right to do business, or making a contract that would be violative of the defendant's charter, or making one which would tend to jeopardize its understanding with the Federal Trade Commission? All the allegations of the first separate defense of defendant's answer are solely directed to the question

of construction and in view of the facts alleged in this defense plaintiffs' construction would tend to subject defendant to a forfeiture or penalty while defendant's probably would not.

THIRD CONTENTION.

THE CASES ON THE SUBJECT OF SALES MADE "F.O.B." AND "F.A.S." IT IS OUR CONTENTION THAT IN THE LIGHT OF THE FACTS OF THE CASE AT BAR, THERE CAN BE NO DISTINCTION MADE IN THE MEANING OF THESE TWO TRADE TERMS, AS USED IN THE INSTANT CONTRACT. (ASSIGNMENT OF ERRORS NOS. VIII, X, XIX, XX, AND XXVI.)

We do not believe it will be denied by opposing counsel that heretofore in the progress of this litigation, it has been admitted by them that under the authority of what may be called the "f. o. b." cases, the actual presence of a named vessel is required, but they contend that in f. a. s. contracts, or contracts where a delivery is "a. s. t." (at ship's tackles), the buyer, without the seller's consent, may waive the requirement that the delivery be made to the named ship.

We have always failed to see the distinction thus made and submit it is not shown by the decided cases.

In *McCandlish v. Newman*, 22 Pa. St. 460, the question was as to whether there had been a delivery of hoop poles. The seller placed the poles on the wharf where they were destroyed by a freshet or flood. If placing the poles on the wharf constituted delivery to the buyer, the loss was his; if not, then the ownership remained in the seller and the loss was the seller's.

The contract itself was found in certain correspondence which contained expressions pertinent to the question of the place of delivery as follows: "Alongside vessel at Richmond"; "alongside of the vessel"; "I will have the hoops drayed to the wharf where the vessel would probably stop"; "have them (the hoop poles) all ready on some wharf". The trial judge construed the contract as requiring delivery "alongside" a vessel, and charged that the delivery on the wharf was not such a delivery and directed a verdict for the defendant.

In affirming this judgment of the District Court, the Supreme Court said:

"It is said that delivery on the wharf is delivery 'alongside' of a vessel pursuant to the terms of the letter of October 21st; but it is not, for the vessel was not there to receive them, and without this there could be no delivery. It would rather seem that the letter of October 21st is necessary to the construction of that of the 25th. There the contract was to deliver alongside of a vessel, that is on a proper wharf, the purchasers to pay the expenses of delivery. In this view a delivery alongside of a vessel was necessary to a perfect sale in this case, and there could be no such delivery until there should be a vessel there to receive them, and there was no such delivery, and no pretense that they were ready for delivery to the vessel."

This case clearly does not permit of a distinction being made between f. o. b. and f. a. s. contracts so far as the requirement of the vessel's presence is concerned. The vessel must be there to enable a delivery to be made, either on board or alongside.

Wackerbarth v. Masson, (1812) 3 Camp. 270.

In this early English case the contract called for delivery of certain sugars "*free on board a foreign ship*". The buyer demanded that the sugars be either weighed off and delivered to him from the warehouse, or that they be transferred into his name on the warehouse books. The seller refused to do either, but offered to put the sugars on board any ship the buyer should name. In the action for breach of contract Lord Ellenborough, in construing the contract, said:

"The delivery for which the plaintiff undertook was on board a ship to be named by the defendant * * * Instead of naming a ship he demanded to have the sugars weighed off and delivered into his own hands, or transferred to his own name in the warehouse keeper's books. *The seller might have been exposed to some risk* or might have lost some advantage by agreeing to this, and he had a right to refuse as *it was not the mode of delivery for which he had stipulated*".

The italicised words are peculiarly applicable to the construction of the contract in the case at bar. The seller here, as we have shown, was deeply concerned in seeing that the lumber he was selling should be actually placed on board an exporting vessel, and it ran a decided risk in deviating from the mode of delivery provided by the contract which gave to it the option of making delivery on the mill wharf within reach of the "W. H. Marston's" tackles, or on barges at that ship's tackles.

Witherell v. Coape, 3 Camp. 271.

This case was tried a few days after *Wackerbarth v. Masson* and Lord Chief Justice Mansfield and a

special jury put exactly the same construction upon a similar contract.

The principle thus early laid down by these two eminent English Commercial Jurists is the undoubted law of today and controls the construction of the contract in the case at bar, for an agreement which calls for delivery at the tackles of the named ship from the mill dock and/or from barges alongside is as certain and definite as to the place and mode of delivery as one which calls for delivery free on board a named ship.

Armitage v. Insole, (1850) 14 Q. B. 728.

In this case the contract provided that defendant should

“give yearly free to the plaintiff during the said three years, 20 tons of coal to be put free on board ship at Cardiff for the use of the plaintiff”.

In giving judgment for defendant, *on demurrer*, Patterson, J., said:

“ * * * the plaintiff must have named the ship and *should have averred* that he was ready and willing to accept the coals and that he had a ship ready to receive them.”

Coleridge, J., said:

“When circumstances left uncertain by the contract are of such a nature that one party cannot perform his part of the contract until they are fixed, the other party insisting on the contract ought to fix those particulars. Here both time and place should have been fixed by the plaintiff, but certainly place.”

Wightman, J., said:

“ * * * the defendants certainly cannot give the coals free on board until they know the ship and at what port it is to discharge. Whatever therefore the construction of the agreement might be as to time, the plaintiff must fail for want of averring that he was ready and willing to name a ship.”

Walton v. Black, (1879), 5 Del. 149.

The instructions given to the jury in this case were (inter alia):

“When the vendor is to deliver a specified quantity of goods on ship board at the port of shipment within a certain period, the purchaser must first name the ship and give the vendor notice of his readiness to receive on board of her.”

Dwight, et al. v. Eckert (1887), 117 Pa. St. 490.

In this case both *Armitage v. Insole and Wackerbarth v. Masson* (supra) are cited with approval and the court said:

“It is a well established principle of the law that in a contract for sale and delivery of goods ‘free on board’ vessel the seller is under no obligations to act until the buyer names the ship to which the delivery is to be made; for until he knows that, the seller could not put the goods on board.”

All the foregoing cases are cited by Mechem in a note which reads:

“When the goods are to be delivered ‘free on board’, the buyer’s vessel, the seller is under no obligation to act until the buyer names or supplies the vessel.”

Mechem on Sales, Vol. 1, Sec. 1130;

McFarland v. Savannah River Sales Co., 247
Fed. 652, (C. C. A. 3rd C.)

In this case there is made precisely the same contention as in the case at bar: If the buyer is unable to have the agreed receiving medium at the agreed place of shipment, at the agreed time, he can waive the requirement which calls for such medium's actual presence and can insist upon the seller making delivery on the wharf there to remain and to be shipped at the buyer's convenience.

The court in the McFarland case said:

"It is clear that the parties did not expect deliveries to be made before the defendant had brought his barges to the place of delivery and shipment, for the contract specifically provided for delivery F. A. S. barge or vessel, and the payment of certain charges to the plaintiff's stevedores for loading the same. It is equally clear that the plaintiff could not make a delivery F. A. S. barge or vessel if there was no barge or vessel alongside. It is very certain that the parties did not intend that the plaintiff should pile 2,000,000 feet of lumber on its wharf, there to remain until taken away at the convenience of the defendant."

The sole distinguishing fact between the contract in the McFarland case and the contract here, on this point of delivery, is, that in the former the buyer was not restricted by the contract to limit his selection to the two barges named, while in the case at bar the buyer was limited to the use of the schooner "W. H. Marston", and delivery was to be made f. a. s. that vessel at loading port.

Maine Spinning Co. v. Sutcliffe, 23 Com. Cas.
216.

In this case, decided December, 1917, the contract called for the sale of 100,000 lbs. of Wool "delivery—Liverpool", which was construed as meaning "delivery f. o. b. Liverpool", and as the wool was bought for export (as was the lumber in the case at bar), it was further construed as requiring delivery on board an *exporting* vessel. Only 25,000 lbs. of wool were delivered and the buyer brought suit for damages for failure to deliver the balance. The question of the mode of delivery was involved and the court on that question said:

"It being the fact, therefore, that licenses were necessary for the export of these woolen tops, and it being not now contended that the defendants did not do their best to obtain the licenses, the fact that they failed to obtain the licenses is a sufficient answer to their failure to make deliveries under this contract subject to one point upon which Mr. Schwabe relies, namely, that under the contract the buyers were entitled to take delivery at Liverpool. The contract says 'delivery Liverpool', and Mr. Schwabe says that the buyers were always ready and willing to take delivery at Liverpool, and the question whether or not they could export the goods to the United States was a matter for them and did not concern the defendants, who were bound to hand over the goods to the buyers in Liverpool. The term 'delivery Liverpool' is to some extent ambiguous, but when one considers that the wool was bought for export to the United States it is easy to come to the conclusion that 'delivery Liverpool' did not mean delivery on rail at Liverpool, but meant delivery in the way in which goods are delivered at Liverpool when they

are delivered for export at Liverpool, namely, 'delivery f. o. b. Liverpool'. If there were any ambiguity as to the meaning of the phrase 'delivery Liverpool' I am entitled to look at the cables and letters which passed between the parties at the time the arrangement was made. Apart from those cables and letters, I should have come to the conclusion that the true construction of the words 'delivery Liverpool' was 'delivery f. o. b. Liverpool'. The matter, however, is made abundantly clear when the cables and letters leading up to and immediately following the contract are looked at because they state in express terms that the contract was f. o. b. Liverpool. Mr. Schwabe, however, contends that it was open to the buyers to waive the term 'f. o. b. Liverpool' and to take delivery of the goods short of Liverpool, or at Liverpool off rail *instead of on board ship*. He says that the buyers might even have taken delivery at Bradford, the place where the goods were prepared for the fulfillment of the contract and from which place they were dispatched. In my opinion, however, that is a mistaken view of the law. It is, of course, quite true that where a term of a contract is wholly and entirely for the benefit of one of the parties to the contract it may be waived by the parties for whose sole benefit it is inserted in the contract. *But a term of the contract as to the mode of delivery is not entirely for the benefit of either party to the contract, and neither party can waive it without the consent of the other*; it is a part of the contract which has to be fulfilled by the seller making delivery at that particular place and the buyer receiving delivery there. Of course, if both parties to the contract agree to waive that term there is an end of the matter, but either party is entitled to insist upon making or receiving delivery in strict accordance with the terms of the contract."

* * * * *

“Mr. Le Queane has referred to the case of *Wackerbarth v. Masson* (2). The headnote in that case is as follows: ‘Where in a contract for the sale of sugar there is the following term, “free on board a foreign ship”, the seller is not bound to deliver it into the hands of the purchaser, or to transfer it into his name in the books of the warehouse where it lies, but only to put it on board a foreign ship, which it is the duty of the purchaser to name.’ That is a decision of Lord Ellenborough as long ago as 1812, and it is directly in point in the present case. I was not aware of that decision, but I was quite prepared, apart from that decision, to hold, applying the rule of law laid down by Lord Watson, *that the buyers in this case were not entitled to demand delivery of this wool anywhere except on board ship at Liverpool*. That being the only point in the case there must be judgment for the defendants.”

The only distinction between the Maine Spinning Company’s case and the case at bar is, that there the delivery was *on board* a vessel and here *alongside* a vessel. In both cases the sale was for export and at the inception of the contract the presence of the vessel was contemplated by both parties. Hence, the absence of the vessel in both cases put an end to the contract.

See also

Nickoll v. Ashton, 2 K. B. (1901) p. 126; 2 Q. B. 1900, 298;

Forrestt & Son v. Aramayo, 9 Asp. 134, 137;

Whiting v. Gray, 27 Fla. 482; 8 So. 726; 11 L. R. A. 526;

Blossom v. Shotter, 13 N. Y. Sup. 523, Aff. 29 N. E. 145.

None of the cases we have cited compare with the case at bar in the number of indications indicative of the place of delivery requiring the actual presence of the vessel. In the instant contract the sale is of *capacity* cargoes for four *exporting vessels*. Two of these vessels were actually loaded and the contemporaneous acts of the parties (as we shall later show) clearly point to a construction of the contract in like manner when applied to the cargo for the "W. H. Marston". There is absolutely nothing to distinguish the contract as it was made to apply to the cargoes for the "W. H. Talbot" and the "Golden Shore", from its application to the cargo for the "W. H. Marston", except that this latter vessel was unable to make the delivery date agreed to by the parties.

In the "Memorandum Opinion" of the trial court three cases are cited in support of the court's conclusion that the naming of the "W. H. Marston" in the instant contract was a stipulation for the benefit of the buyers and could be waived by them. One of these cases we have already discussed (*Meyer v. Sullivan*), and the remaining two can be briefly distinguished.

Ellsworth v. Knowles, 97 Pac. 690.

This was the case of a sale of apricots wherein was found in the contract the expression: "Buyer to furnish lace paper with usual allowance for same; buyer also to furnish labels free". There was no delivery of the apricots and a minor point of controversy urged by appellants was, that plaintiff never supplied the lace paper and that this was an act that he was required

to do before defendants could pack or deliver the apricots. The court held, however, that

“it was clearly shown that the provision, ‘buyer to furnish lace paper with usual allowance for same’ was a provision for his benefit. One of the defendants so testified”.

It was also found that

“while defendants were still trying to obtain the apricots to fill the contract and before they finally abandoned their efforts to carry out the contract, plaintiff notified them that they could use their own lace paper. He thus waived a provision of the contract intended for his benefit”.

This is all that the case shows and therefore is woefully weak as a decision supporting the trial court’s finding that the naming of the “W. H. Marston” was a provision for the benefit of the plaintiffs and could be waived by them.

Harrison v. Fortlage, 161 U. S. 64.

In this, which was the last case cited by the court, the contract was for 2500 tons of sugar “*shipping or to be shipped during this month*” (June) from the Philippines to Philadelphia per steamer ‘*Empress of India*’”. The sugar was placed on board the “*Empress of India*” during the month of June and the voyage commenced. In the course of the voyage, and while at anchor at Port Said the “*Empress of India*” without fault, was run into by another steamer and was so much damaged as to require the landing of her cargo after which she went to Alexandria to be repaired. After being repaired her cargo was reloaded

and the vessel sailed from Port Said November 30, 1889, and in crossing the Atlantic met with extraordinary rough weather which forced her to put into Bermuda January 5, 1890 and there, upon the recommendation of surveyors and in order to proceed on her voyage with safety, she discharged 700 tons of sugar. On February 11, 1890, the "Empress of India" arrived at Philadelphia with the remaining 1800 tons. The 700 tons were forwarded from Bermuda by another steamer which arrived at Philadelphia March 3, 1890.

The tender by the plaintiffs of all the sugar was refused by defendants upon the sole ground that the contract required the sugar to be brought to Philadelphia in the "Empress of India". The case finally reached the Supreme Court on Writ of Error where the judgment of the Circuit Court was affirmed. Justice Gray in delivering the opinion of the court said that a contract "*to ship by*" a certain vessel, for a particular voyage, ordinarily means simply "*to put on board*". Again it is said:

"The contract nowhere requires that the sugar shall arrive in Philadelphia by the 'Empress of India' * * *" "A particular ship being designated as to the putting on board only and not as to the arrival, it is not to be inferred that the goods must be carried to their destination in the same ship."

From these brief citations it will be seen that the case cannot possibly be held an authority for holding that a named exporting medium is for the benefit of

the buyer and may be waived by him without the seller's consent.

The situation of the *non arrival* of the "Empress of India" so as to be unable to receive on board the sugar, as is the case of the "W. H. Marston," with reference to the lumber, was provided for specifically in the following provision of the contract:

"Should the steamer through any unforeseen circumstances, such as accidents of the sea, stress of weather, etc., be unable to load these sugars within the time specified and the sellers cannot secure other steam tonnage to load in June, this contract is to be void".

The trial court's decision can, we submit, find no support in either of the three cases cited, and moreover, neither of such cases tend in the slightest to affect the principle laid down in the cases cited by us, namely: that in contracts f. o. b. or f. a. s. a named vessel, the stipulation as to the mode of delivery which requires the actual presence of the vessel, cannot be waived without the agreement of both parties.

It is further held by the lower court as a finding of fact, that the stipulation of the contract as to the "W. H. Marston" does not affect the identity of the subject of the sale, or the time or place of its delivery. "It was wholly immaterial whether plaintiffs used the 'Marston' or some other medium for the shipment of the lumber." It is also held as a conclusion of law:

"That the failure of the plaintiff to have the 'Marston' alongside the mill wharf ready to take

delivery of the lumber within the delivery dates did not relieve the defendant from making delivery as demanded by plaintiff",

namely: to a barge or barges. In other words, from these findings and conclusions it is shown to be the opinion of the court, that so much of the contract agreeing that the schooner "W. H. Marston" should be one of the receiving mediums for the lumber sold; was an immaterial stipulation which it was the buyers' privilege, at any time, to disregard. In this finding the court arrogates to itself the power to say whether an agreed stipulation in a mercantile contract touching the mode of delivery, is material or immaterial, of value or without value, to one of the parties making the same. In the instant contract the court arrogates to itself the right of holding as valueless and immaterial, to the seller of this lumber the stipulation of its contract requiring that the receiver of the lumber, within the agreed delivery dates, should be a certain named exporting sailing vessel, and this despite the fact that the seller offered to show that it could not legally make anything but a sale for immediate export and that this was known to the buyer when the sale was made.

We submit that the circumstances under which this contract was made were such as to make the stipulation relative to the mode of the lumber's delivery of vital importance to the seller, and of such materiality as to warrant the conclusion that without the stipulation for delivery to exporting vessels, named or agreed to be named, the contract would never have been made.

We wish now to discuss, in order, the court's finding to the effect that neither subject matter, time or place of delivery are affected by the naming of the "W. H. Marston".

FOURTH CONTENTION.

WE CONTEND THAT THE COURT ERRED IN NOT HOLDING THAT THE SALE IN QUESTION WAS OF A CARGO TO SUIT THE CAPACITY OF THE "W. H. MARSTON", ESTIMATED TO BE 1300 M FEET, 15 PER CENT MORE OR LESS, AND ALSO ERRED IN HOLDING THAT THE SALE WAS FOR 1300 M FEET WITHOUT REFERENCE TO THE "W. H. MARSTON" AS A RECEIVING MEDIUM, AND THAT DELIVERY OF SAID 1300 M FEET OF LUMBER COULD HAVE BEEN TAKEN ON BARGES, OR ANYTHING ELSE BESIDES THE VESSEL. (ASSIGNMENT OF ERRORS NOS. VI, XV, AND XIX, 7TH GROUND, AND XXVII.)

The trial court says of this matter:

"It is claimed that the contract was for a cargo sale and that the capacity of the 'Marston' was the measure of the quantity to be delivered but the contract named the quantity, and the expression therein '15% more or less to suit capacity of vessel' would simply allow the specific quantity to be varied to that extent if the named vessel had been tendered as the receiving medium, but the failure to tender it would not relieve the defendant from making delivery if demanded of the specific quantity".

(*Memorandum Opinion, Record, page 61*).

The provisions of the contract touching this point should first be examined for it is primarily a question

of law what the subject matter is, to be determined by the contract itself.

As has been shown the first instrument making up the final contract is defendant's letter dated November 2, 1916. The provisions of this letter touching the subject matter of the sale are the following:

"This will confirm sale to you of four *cargoes* Fir F. A. S. mill wharves as follows:

'W. H. Marston' 1300 M. October to December, 1917

'W. H. Talbot' 1000 M October to December, 1917

and two of your own vessels to be named later, with a combined capacity of 1450 M, both for loading October to December 1917, cargo to be furnished F. A. S. vessel at loading ports at 60 M daily * * * but one loading port only for each vessel, loading port to be named by us in ample time to give vessel instructions before leaving her next previous port of call.

Tally and inspection by Pacific Lumber Inspection Bureau at loading port. Certificate to be furnished and to be final * * * "

The next of the provisions bearing on the question of the subject matter of the sale are to be found in plaintiffs' letter of November 6, 1916, reading as follows:

"We have to acknowledge receipt of your sale note covering 3500 M 15% more or less October to December 1917. We now take pleasure in approving same as per enclosed. It is understood that the vessels named in your sale note are not to load above the bridges on the Columbia River * * * We presume also that you would have no objection if it was found convenient to our substituting other vessels in place of the 'Marston' or the 'Talbot'." (Record page 157).

It will be noted that the opening statement of this letter of acknowledging receipt "of your sale note covering 3500 M 15% more or less", is incorrect. The aggregate of the lumber for the *four cargoes* is 3750 M. and not 3500 M, 15% more or less.

The next provision on the subject is found in defendant's answering letter of November 8, 1916, and is as follows:

"We acknowledge yours of the 6th and confirm your understanding that none of these vessels will be required to load above the bridges at Portland * * * This then would leave only Clark & Wilson and the Peninsula Mills as possibilities, and we would prefer to keep them in that position as it might be very necessary for us to load one of your vessels at one of these mills.

As regard substituting other vessels for 'Marston' and the 'Talbot'; As these vessels are now matters of record in the contract, we would prefer not to have any agreement giving you the option of naming other vessels. If, however, you have now or will have at any future time other vessels in like position and for your convenience wish to substitute them for either one or both of these vessels, we will be pleased to go into the matter with you with the view of meeting your necessities" (Id. page 158).

No immediate answer seems to have been made to this last letter but there followed a month later, the confirmatory letter of December 8, 1916, by which the contract was consummated *as to each* of the four vessels. These instruments of confirmation, so called "*Acknowledgments of Order*", were all alike in their general terms and applied to the "W. H. Marston",

“W. H. Talbot”, “Golden Shore” and “Wm. Borden”, the last two vessels having, since the letter of November 2, 1916, been named by the buyers in accordance with their agreement so to do found in this latter instrument. The “Acknowledgment of Order” for the “W. H. Marston’s” cargo has in it, inter alia, the following:

“This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per this confirmation irrespective of original order unless advised to the contrary by you.

Sch. ‘W. H. Marston’.

1,300,000 feet B. M. 15% more or less to suit capacity of vessel.

* * *

Destination: Australia. (Usual Australian Specifications).

Grade: As per G List, P.L.I.B. Certificate to be furnished.

Delivery: 60 M feet per working day or pay demurrage as provided by Charter-party.

Terms and Conditions: As per ‘G’ List.

Notes: This price is for delivery F. O. B. Mill Wharf, Knappton, within reach of vessel’s tackles and/or on barges A. S. T. Mill Wharf, Knappton, Wash.”

(Record pages 82, 83).

“G” list, referred to twice in this “Acknowledgment of Order”, is an important part of the contract in suit (Exhibit A attached to Complaint; see Stipulation waiving printing, Record page 344), and should be carefully examined. On its face it purports to be a

price list for Douglas Fir to be furnished to *sailing vessels at their tackles*.

Other important documents referred to in this "Acknowledgment of Order", are the "Usual Australian Specifications", and in plaintiffs' letter of September 19, 1917, (plaintiffs' Exhibit No. 7, Record page 91) there was sent to the defendant not only the required specifications showing the sizes and exact quantities of the "W. H. Marston's" cargo of 1300 M feet, but pro forma bills of lading, together with the requirement for the Lumber Bureau Inspection certificate, the Marine Underwriters Surveyor's Certificate, the Master's Demurrage Release, the Stowage Plan of the ship and the Invoice of the cargo. This letter of September 19, 1917, which is in the nature of a specific demand for the documents enumerated therein, is of great importance in that it shows that at its date plaintiffs were still of the belief that the sale was of a cargo for the schooner "W. H. Marston" and nothing else. If the idea of a vessel is to be omitted from the contract in suit, then neither the letters of November 6 and 8, 1916, need have been written nor, aside from the specifications, need there have been any demand in the letter of September 19, 1917, for the other documents. Of what meaning in this transaction are bills of lading, signed by the Master of the "W. H. Marston", a "Demurrage Release", also to be signed by the vessel's Master, or the certificates of the Marine Surveyor, certifying to the proper loading of the ship, or the Stowage Plan of the ship,—if the contract is one which is to be shiplessly construed?

The *specifications* enclosed in this letter foot up the exact *estimate* of the "Marston's" capacity, 1,300,000 feet, while the pro forma bills of lading leave the number of feet of the different specification sizes blank (defendant's Ex. "E", original. See Stipulation, Record page 334). This obviously was the only thing the plaintiffs could do at this stage of the transaction, treating it as a cargo for a named vessel, for the reason that it could not possibly be known how many of such specification sizes could be loaded so as to constitute a capacity cargo for the "Marston" until the loading was actually completed, therefore, of necessity, the bills of lading were not filed in as were the specifications.

Major Griggs, of the St. Paul & Tacoma Lumber Company, in testifying of these very specifications, said:

"Assuming that these are the specifications for a cargo to suit the capacity of a named vessel, it would be impossible before the actual loading of that vessel to know the number of the different sizes and grades that would go into that vessel" (Griggs, Record page 186).

Mr. Ames, of the Puget Mill Company, one of the largest concerns on this Coast, in speaking of the same specifications, testified:

"Looking at the exhibit marked 'Defendant's Griggs Identification 1', purporting to be specifications, I would not know how these specifications for a cargo to suit the capacity of a named vessel could be fulfilled by loading on to barges. Of course you can put the lumber shown on these

specifications on to the barge, but you could not put it on to a barge so as to suit the capacity of a named vessel. The reason for that is that if I were going to do that I would want a definite amount. You could not put these lengths, breadths and sizes to suit the capacity of a named vessel on that barge unless you knew exactly what the ship was going to carry. I could not fill that order in proportion. It is possible to ascertain the amount a ship is going to carry only as you load her" (Ames, Record pages 202, 203).

Plaintiffs' witness, Captain Dollar, testified on cross-examination as follows:

"The sale under a contract containing this expression, 1300 M feet, 15% more or less to suit the capacity of the named vessel, the amount of that sale, cannot be determined until after the vessel is loaded and her capacity found out" (Dollar, Id. 283).

The plaintiff himself, on cross-examination, gives this testimony:

"Q. Here you have furnished to the seller a specification (bill of lading) with the different kinds of lumber that the order is for, but you have left blank the number of pieces, while at the same time you have sent in a specification that gives the number of pieces; now, I ask you why it was that in the specification you named the number of pieces, and in the pro forma bill of lading you left the number of pieces blank? Isn't it because you could not know until the vessel was actually loaded with this specification lumber, how many of the different pieces would have to be inserted in the bill of lading?

A. Exactly, but the mill does not have to do that; our agent can insert that in the bill of lading.

We don't have to send that bill of lading to the mill.

Q. And that is the reason, is it not, you could not tell until the vessel is actually loaded how many pieces of specification lumber would appear in the bill of lading?

A. No, not until the vessel is loaded"
(Cōmyn, Id. 161, 162).

The vessel's master could not possibly sign such bills of lading before it was known by actual loading how much lumber constituted the vessel's cargo and the number of the various specification lengths breadths and sizes that were actually loaded.

These documents all point conclusively to the fact that on September 19, 1917, the plaintiffs recognized that the sale was a cargo to suit the capacity of the "Marston", for they were papers demanded by the plaintiffs from defendant that could apply only to a cargo to be loaded on that vessel and could only be furnished after that vessel had been loaded to her capacity. Mr. Comyn testified as to the futility of some of these required documents, in case barges were used:

"If we had not supplied a vessel there, but had put barges there to take this lumber, we would not have required a bill of lading, we would have required specifications. We would have acquired the Lumber Bureau Inspection Certificate. We would not have required the Marine Underwriters Surveyor's Certificate. We would not have required the Master's demurrage release, nor a Stowage plan" (Record p. 92).

It is also significant that when on September 20th, the day following the sending of these documents to the

defendant, plaintiffs were advised by defendant that the "Marston" was then ninety-six days out from the Columbia River bound for Melbourne, and had not yet arrived, and that "under no conditions could we commence loading this vessel later than December on the old contract", their reply to this statement, dated September 21st, was simply this: " We have no comment at the present moment to make on this matter, beyond the fact to correct your impression that the *cargo* is bought specifically for Oct/Nov/Dec." Adding irrelevantly: "*Our contract was originally* for specified quantities for July to December, and the 'Marston' was one of the boats named to apply on same." (Italics ours). It was not until nearly a week later that plaintiffs were prepared to reply to defendant's letter of September 20th. On September 27th, they wrote as follows:

"With further reference to 1,300,000 feet B. M. fifteen per cent, more or less, to be furnished by Knappton Mills and Lumber Company for October/November/December 1917:

We will take delivery of this lumber f. a. s. mill wharf Knappton and/or on barges a. s. t. mill wharf Knappton in the month of December. Please advise us promptly on what date in December you will make delivery" (Plaintiffs' Ex. No. 10, Record page 95).

In this letter several significant facts will be noted:

When the plaintiffs had on September 20th been informed that the "Marston" was then ninety-six days out from the Columbia River and had very little chance of discharging her cargo at Melbourne and returning to

the Columbia River in time to load in December, and that the defendant could not load that vessel under the \$9.50 contract if she did not arrive within the agreed loading time, plaintiffs' obvious and immediate reply should have been, in effect: "we will load on barges", *if* at that time they had any idea that their contract gave them such a right. Why was it that they said: "We have *no comment* at the present moment to make on this matter"? Why didn't they have any comment to make, if they then had any idea that the "Marston's" presence was not necessary? When it is considered that plaintiffs' letter of September 27, 1917, written nearly a year after the initiation of the contract, was the first suggestion that they believed the "Marston's" presence was not necessary at the loading port within the agreed loading date,—when it is remembered that eight days before this letter of September 27th, plaintiffs had furnished defendant with specifications *for the "Marston" cargo* and had required of defendant shipping documents for that vessel's cargo—when it is further remembered that the complaint filed subsequently, on December 27, 1917, was based on a construction of the contract that gave plaintiffs the *right* to receive this lumber *on barges*, it requires no stretch of imagination to see, that between the dates of September 20 and September 27, 1917, plaintiffs had consulted counsel and had received the erroneous advice that the contract, as embodied in the provision:

"Notes: This price is for delivery f. o. b. mill wharf, Knappton, within reach of vessel's tackles and/or on barges a. s. t. mill wharf, Knappton, Wash.",

gave to them the right to ignore the "Marston" and substitute for her barges. Barges were available, the "Marston" was not, and there was a large sum of money involved as profit.

It is instructive, also, to see how the letter of September 27, 1917, ignores the terms of the contract and with what calm assurance it attempts to change the subject-matter from a cargo to suit the capacity of the "W. H. Marston", to "1,300,000 feet B. M. 15% more or less": "*With further reference to 1,300,000 feet*"; there was no such reference in defendant's letter of September 20th. It was a *cargo* for the "Marston" that letter referred to. "*15% more or less*",—there is no such abbreviated expression in the contract. The expression is, "*15% more or less to suit the capacity of the vessel*". To be furnished "*for Oct/Nov/Dec. 1917*". Plaintiffs seem to have changed their minds as to the contract's delivery dates, for in their letter of September 21st, "*Oct/Nov/Dec. 1917*" was a mistake which the letter was written to correct. "*We will take delivery of this lumber f. a. s. mill wharf and/or on barges a. s. t. mill wharf in the month of December.*" (Italics ours.) There is nothing in the contract to warrant any such statement. Neither the initial letter of November 2nd, 1916, nor the "Acknowledgment of Order" of December 8th, 1916, warrants the *taking of delivery* f. a. s. mill wharf and/or on barges a. s. t. mill wharf. In the former document both of the two references to "f. a. s." are connected with a vessel. The first reference reads:

"Four cargoes fir f. a. s. mill wharf as follows:
 'W. H. Marston' " etc.

In this reference the vessel cannot be eliminated. It is as if it read: "*f. a. s. W. H. Marston mill wharf*". The second reference reads: "*Cargo to be furnished f. a. s. vessel.*"

What is the warrant, therefore, for the statement in the letter of September 27th: "*f. a. s. mill wharf*", when the contract can be only read: "*f. a. s. vessel mill wharf or f. a. s. vessel loading port*"?

In the "Acknowledgment of Order" dated December 8th the only express reference to the place of delivery is found in the option, *retained by the defendant (seller)*, to *make delivery f. o. b. mill wharf, within reach of vessel's tackles* and/or on barges at ship's tackles mill wharf.

At this point we wish to call the attention of the court to two documents which make perfectly clear plaintiffs' *real knowledge and understanding* of the result which inevitably follows the failure of a named vessel to make her agreed loading date. When there was introduced, at the trial, the contract with the Charles Nelson Co., intended to show that that company had at one time specifically agreed in writing to load certain named vessels' cargoes on barges, if such vessels failed to make their agreed loading dates, we called for all the correspondence relating to such contract, and the following was forthcoming: First, a letter from *plaintiffs* to the Charles Nelson Co., dated *September 1, 1917*, containing the following:

"In the event of your being prevented by strikes and/or lockouts from loading any or all of the above three vessels we to have the privilege of

substituting other vessels or barges to take delivery of the quantity of about 2,000,000 feet at \$11.00 Base 'G' List, less $2\frac{1}{2}\%$ and $2\frac{1}{2}\%$ within 90 days after the starting up of your mills and your logging camps, you to notify us when you commence operations."

(Plaintiffs' Ex. No. 30, Record pp. 305, 306.)

There was then produced a second letter from plaintiffs, dated *September 5, 1917*, to the Charles Nelson Co., which reads as follows:

"We have to acknowledge receipt of your September 4th, T-1, in duplicate.

The same appears to us to be in order with the exception that in the event of either of the three vessels named, namely, the 'R. R. Hind', 'Encore', 'Jas. H. Bruce', not making their specified loadings, we shall have the right of taking delivery of the *cargoes* of each and all of them *by barges*, and it is on this understanding that we accept the arrangement.

You will readily understand the reasons for this. If your mill is operating at the loading dates named on the respective vessels, and any or all of them should not make the specified loading dates, *you will be at liberty to abrogate the contract*, which would work a hardship on us in view of our taking the 'Billings', 'Rosamond' and 'Espada' cargoes from you and completing same at current prices." (Italics ours.)

(Plaintiffs' Ex. No. 31, Record pp. 306, 307.)

It therefore appears that plaintiffs' letter to *defendant*, of *September 27, 1917*, advising of their purpose to take delivery of the cargo for the "W. H. Marston" on barges, as that vessel appeared unable to make her agreed loading date, was a bluff, and in direct opposi-

tion to what plaintiffs *knew at the time not* to be their right unless expressly given them by the contract. They had just written to another company, with whom they were negotiating for three cargoes for three named vessels, and as a reason for inducing that company to permit of the use of barges, they had informed it that unless the right, under the circumstances, was specifically given in the contract, "*you would be at liberty to abrogate the contract*" and that this abrogation of the contract under the circumstances "*would work a hardship on us*". It is only too plain that plaintiffs in the case at bar were attempting, in the letter of September 27th and throughout all their subsequent moves, to do the very thing which they then knew they had no right to do, and the circumstances point pretty conclusively to the fact that the letter of September 27, 1917, was the result of the erroneous advice of counsel to the effect that the instant contract, *in express terms*, gave to plaintiffs the right which they claimed. The significant thing about the matter is, that on *September 5, 1917*, plaintiffs knew that they had no right to use barges in place of the "W. H. Marston", and that when defendant wrote them on September 20th saying that unless the "Marston" arrived at her loading port before the expiration of her loading period, she would lose her right to a cargo, they were told that which they already knew, and their entire conduct, subsequent to learning that the vessel could not make December loading, shows a persistent effort to secure this lumber even though their right to it was known to have been forfeited, because of the vessel's inability to reach her loading port.

From all the circumstances, we submit that from the very inception of the contract, plaintiffs knew well that the actual presence of the "W. H. Marston" at the Knappton dock was required before the end of December, or her right to a cargo would be forfeited.

Here is another matter which points to the correctness of this view. Defendant's answer alleges in effect, that plaintiffs offered defendant the sum of \$2500 if the contract could be changed so as to extend the "Marston's" loading date, thereby permitting plaintiffs to take advantage of an offer from the vessel's owner of \$5,000.00 for the privilege of loading, at Melbourne, a cargo instead of coming back from there in ballast as provided by her charter party, and also securing to the vessel her cargo under the instant contract.

Mr. Comyn denied at the trial having made any such offer to defendant. On the contrary, he testified that he had been told by Mr. J. Clyde Daly, his manager, that the offer of \$2500 had been made to defendant by Mr. J. B. Blair of J. J. Moore & Company (Record pages 115, 116, 168, 169). Despite this denial and assertion, we believe the court will find no difficulty in finding that the offer *was made by the plaintiffs*. Mr. Baxter, defendant's general manager, so testified (Record pages 229, 230, 294, 297, 298). Mr. J. B. Blair denied that he made it to any one, either for himself or for any one else (Record pages 243, 244), and when with great reluctance we were forced to call Mr. J. Clyde Daly, plaintiffs' former manager, the following testimony was elicited:

"In 1916 and 1917 I was employed by Comyn, Mackall & Co. in the Australian Lumber Department. I never told Mr. W. Leslie Comyn, the plaintiff in this case, that Mr. J. B. Blair, of J. J. Moore & Co., had offered the Douglas Fir Exploitation & Export Company, or Mr. Baxter, the manager of that company, \$2500 or any other sum, if the Douglas Fir Exploitation & Export Company would extend the loading period of the 'W. H. Marston'. As manager of the Australian Lumber Department of Comyn, Mackall & Co., I myself made that offer to Mr. Baxter on behalf of Comyn, Mackall & Co." (Record pages 292-293).

Although Mr. Comyn later on was again called to testify, he gave no further evidence touching upon this offer, and on that subject, at least, he stands discredited.

Plaintiffs surely were not offering \$2500 for an extension of the "Marston's" loading date if they did not construe their contract as calling for a cargo to suit the capacity of that vessel. Under plaintiffs' *present* construction of their contract they could, *at any time*, have taken delivery on barges, and need not have placed the "Marston" at the Knappton loading dock at all.

But we have not concluded our reference to the matters of contemporaneous construction on the question of the subject-matter of the contract. A consideration of the conduct of the parties as applied to the schooners "W. H. Talbot" and "Golden Shore", under this identical contract, is enlightening, if not conclusive.

Take first the "Talbot":

The cargo *specifications* for the "Talbot", furnished defendant by plaintiffs, show that they are for exactly 930,000 feet of lumber. The estimate of her capacity

shown by the letter of November 2nd, as well as the later "Acknowledgment of Order", is 1,000,000 feet, while on the "Talbot's" specifications for *930,000 feet*, furnished to the defendant July 23, 1917, there is found this significant direction:

"This vessel *should carry* about 1,000 M feet, and you are to load last, under no mark, 6x12, 10 to 40 feet, merchantable, *to complete her cargo.*"

(Defendant's Ex. "D"; also Record page 149.)

Could there be stronger contemporaneous construction of the contract, showing that it was a sale of a cargo "to suit the capacity" of the named vessel? The definite number of feet which plaintiffs' claim this to have been a sale of, as affecting the "W. H. Talbot", was 1,000,000. Yet here is evidence uncontrovertible that the 1,000,000 feet 15% more or less, mentioned in the contract, was only an estimate of what the vessel "should carry". The sale was of the amount she *actually* carried, the amount "to suit her capacity", and the direction from plaintiffs was: load the 930,000 feet according to the specification sizes, and then load last, without any mark, sizes, 6" x 12"—10 to 40 feet long, "*to complete her cargo*".

The "Talbot" actually carried, in addition to her 930,000 feet of specification lumber, 41,974 feet of pieces 6 x 12, 10 to 40 feet long, with no mark, for her completed cargo totalled 971,974 feet (Baxter, Record page 248).

This, however, is not all. The other vessel, which, arriving within her loading date, was loaded, was the

“Golden Shore”, one of the “*to be named*” vessels of the initiatory letter of November 2nd, 1916. She and the other vessel, subsequently named, were agreed to have a *combined* cargo of 1450 M feet. When the “Golden Shore” was named on February 28, 1917 (Record page 147; Defendant’s Ex. “A”), the “Acknowledgment of Order” for that vessel called for a cargo of $\frac{1}{2}$ of 1450 M feet or “725 M feet, 15% more or less”. On May 23, 1917, the specifications of the “Golden Shore’s” cargo were furnished defendant (Defendant’s Ex. “C”, Record page 148), and provided for loading first on the vessel a certain lot of specification lumber amounting to 276,002 feet, and for loading last on the vessel a certain other lot of specification lumber amounting to 551,979 feet, making a total of 827,981 feet, and the plaintiffs’ instructions for this cargo were that the last lot, of 551,979 feet, was “to be *increased or decreased* proportionately to *suit capacity of vessel*” (italics ours).

The contract under which all of these vessels were to be loaded to their capacity was the same. The letter of November 2, 1916, was, in the case of each vessel, followed by an “Acknowledgment of Order”, in general terms exactly the same. If one was the sale of a capacity cargo, the same terms and conditions made each and all, *sales of capacity cargoes*. Is it not perfectly clear from the treatment by the parties of the two vessels which made their loading dates, that plaintiffs recognized as to them, that the subject-matter of the contract was a cargo to suit the respective capacities of the respective vessels, and that the definite number

of feet named in the contract, with the clause "15% more or less" was nothing more than an approximation of what that cargo might be?

Supporting this construction is the testimony of the experts, all to the same effect, that in contracts for cargoes for named vessels, the expression of a definite number of feet coupled with the phrase "15% more or less", is nothing more than the estimate of the parties as to what the cargo for the named vessel will be, and is important as giving to the furnishing mill some idea of the amount of lumber that it will be required to cut and have ready when the vessel reaches her loading port.

No other reason for the insertion in such a contract of such a limitation appears in the record, and were it not for this reason, there would be no question but that the insertion of the limitation would be senseless. The very fact of the use of the phrase, "15% more or less", is evidence of the *indefiniteness* of the amount of the sale. Were the sale for a definite amount of lumber there would be no need for the use of this term. Nor is there any need for its use in case it is a sale of a cargo to suit the capacity of a named vessel, except for the reason shown in the record: its assistance to the furnishing mill.

We submit, in conclusion of this subject, that both plaintiffs' and defendant's *contemporaneous construction* of the contract is correct *in law*, as we now hope to show.

Authorities in support of defendant's contention that the subject-matter of the contract was a capacity cargo for "W. H. Marston", and was not, as claimed by plaintiffs, 1,300,000 feet of lumber, fifteen per cent more or less.

Harrison v. Micks, Lamber & Co., 14 Aspinnall M. L. C. (N. S.) 76.

In this English case *the sale was of "the remainder of the cargo (more or less about) 5400 quarters Manitoba wheat * * * at Hull ex Clodmore"*. The contract was in the ordinary printed form of the Hull Corn Trade Association. Clause 37 provided:

"The word 'about' when used in reference to quantity shall mean within five per cent over or under the quantity stated."

As it turned out, the "remainder" of the Clodmore's cargo was 5974 quarters, and the controversy turned on the question of whether the buyer was compelled to accept 5974 quarters or only 5400 quarters, with possibly the addition of 5%, or 270 quarters.

The court held that the words "*(more or less about) 5400 quarters*" were words of *estimate* only and did not mean that the buyers were to be limited to that amount with a possible 5% margin either way; that the sale was of the remainder of the "Clodmore's" cargo.

The decision is based on the cases of *Levy v. Berk*, 2 Times Law Reports 898, and *Borrowman v. Drayton*, 35 L. T. Reports 727; 2 Ex. Div. 15; 3 Aspinnall M. L. C. (N. S.) 303.

In the former of these cases it was held by Lord Esher, M. R., that where a buyer contracted for a "cargo" and mentioned the amount, the governing

word was "cargo" (unless the contrary was clearly shown), and the buyer was bound to take the cargo whatever the quantity.

In the latter case, Mellish, L. J., speaking for the Court of Appeal, held that a contract which called for a cargo of from 2500 to 3000 barrels of petroleum required delivery of the whole cargo of the ship "Lindesmas", consisting of 3300 barrels, unless, under the contract, the buyer was bound to accept a *part* of a cargo. The court said:

"We think that effect must be given to the term 'cargo' as distinguished from the specified quantity; as, if the parties had intended otherwise, it would have been enough to specify the quantity without introducing the term 'cargo' at all."

Brawley v. U. S., 96 U. S. 168; 24 L. Ed. 622.

The contract in this case called for delivery at a Government post of 880 cords of wood, more or less, as shall be determined to be necessary by the post commander for the regular yearly supply. The post commander informed the furnisher of the wood that but 40 cords would be required under his contract, and in the suit which followed the Supreme Court held that the provision of the contract which called for 880 cords of wood (more or less) was to be regarded merely as an estimate of what should be necessary, to be determined by the post commander. In the course of its decision the court says:

"Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufac-

tured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about' or 'more or less', or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it."

The same court, in speaking of the principle laid down in *Brawley v. United States* (supra), said:

"There is no doubt whatever of the general proposition that where the words 'about' or 'more or less' are used as estimates of an otherwise designated quantity, and the object of the parties is the sale or purchase of a particular lot, as a pile of wood or coal, or *the cargo of a particular ship*, or a certain parcel of land, the words 'more or less' used in connection with the estimated quantity are susceptible of a broad construction, and the contract would be interpreted as applying to the particular lot or parcel, provided it be sufficiently otherwise identified (*Pine River Logging & Improvement Co. v. United States*, 186 U. S. 289; 46 L. Ed. 1169)."

Pembroke Iron Co. v. Parsons, 5 Gray (71 Mass.) 589:

This was an agreement to sell a cargo of iron to be shipped per barque "Charles William"—about 300 to 350 tons—and it was held to have been complied with by a delivery of 227 tons—as much as that vessel could seaworthily carry. The court says:

"The figures at the bottom, 'about 300 to 350 tons', are undoubtedly part of the contract. But, taken with the context, they manifestly express an

estimate only, and do not control the descriptive clause designating and limiting the subject of the contract. The defendant, having delivered a full cargo, has performed his contract, and the instructions of the judge were correct."

The principle is approved and applied by the Circuit Court of Appeals for the 6th Circuit, in

Marx v. American Malting Co., 169 Fed. 582, 584;
Inman Bros. v. Dudley & Daniels Lumber Co.,
 146 Fed. 449, 451.

By the Circuit Court of Appeals for the 8th Circuit, in

St. Louis Paper Box Co. v. Hubinger Bros. Co.,
 100 Fed. 595, 599.

And also by the Circuit Court of Appeals for the 9th Circuit in the case of

Wolff v. Wells Fargo & Co., 115 Fed. 32, 36.

See also

Rose's Notes on United States Reports, Vol. 10,
 p. 74.

These cases are unanswerable on the vital question of the subject-matter of the instant contract. They are the cases which were cited by us to Judge Van Fleet on plaintiffs' demurrer and motion to strike, and which may well be assumed to have controlled the court at that time when the former ruling on the demurrer to the complaint was practically reversed, in that it allowed the allegations of the answer touching the question of the presence of the "W. H. Marston",

and kindred allegations, to remain and be proved as matters of defense.

If the court has reached the conclusion that the subject-matter of the contract was a cargo to suit the capacity of the "W. H. Marston", that ends the matter, for it must be conceded as matter of law that the subject-matter of a contract cannot be changed without the consent of both parties. If the subject-matter was a capacity cargo for the "W. H. Marston", it follows that unless that vessel was present at the loading dock *within the agreed loading time*, defendant could not have made a delivery to her of such cargo.

In *Norrington v. Wright*, 115 U. S. 188 (29 Law. ed. 370), the Supreme Court cites with approval Lord Chancellor Cairns' opinion delivered in the case of *Bowes v. Shand* (2 App. Cas. 455, H. of L.), where it is said:

"It does not appear to me to be a question for your Lordship, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment shall be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance."

This principle announced by the Lord Chancellor in *Bowes v. Shand* is cited with approval in the recent English case of *Sutro v. Hielbut*, XXIII Com. Cas., Part 1, pp. 21, 28 (C. A. 1917).

In face of the many proofs in the case at bar it seems futile for plaintiffs to attempt the contention that when

the contract was entered into it was *not* the intention and agreement to have the "W. H. Marston" present to take delivery at her tackles. If such *was* the original intent, is it not clear that it was a cargo for that vessel which was to be taken delivery of? If so, then a cargo for the "W. H. Marston" was the subject-matter of the contract, and in that respect certainly the contract cannot be changed so as to make the subject-matter something else, namely, 1300 M feet of lumber, 15% more or less, without the seller's consent.

We now pass to a consideration of the next matter affected by the naming of the "W. H. Marston".

FIFTH CONTENTION.

THE TIME OF DELIVERY.

WE CONTEND THAT THE TIME OF THE CARGO'S DELIVERY IS FIXED BY THE TIME OF THE ACTUAL ARRIVAL OF THE "W. H. MARSTON" AT THE LOADING DOCK AT KNAPPTON, BETWEEN OCTOBER 1 AND DECEMBER 31, 1917. (ASSIGNMENT OF ERRORS NOS. XV AND XIX, 8th AND 12th GROUNDS, AND XXVIII.)

The agreed time for the delivery as well as for the shipment of these four cargoes of lumber was alike for all the vessels, namely: "October/December, 1917", which means at any time between October 1 and December 31, 1917, although Mr. Baxter testified that had the "W. H. Marston" arrived at the loading dock on December 31, 1917, she would have been loaded (Baxter, Record page 230).

It being conceded that the agreed time of delivery in a sale contract of this nature is in the nature of a warranty which cannot be waived or changed by one party without the consent of the other, the question is this: Was the time of delivery in this contract affected by the naming of the "W. H. Marston"? We say "*yes, beyond the shadow of a doubt*". If, as contended by plaintiffs, the naming of the "W. H. Marston" and other vessels was a mere "incident", and they had the right to ignore the vessels and substitute, instead, barges on which to take delivery of these four cargoes, or wagons, or anything else,—then it is manifest that the exact time of delivery, between October 1st and December 31st, could be fixed definitely between such dates, *by the plaintiffs alone*, conditioned only upon their ability to secure and place barges or other receiving mediums at the agreed loading docks. This asserted right of using barges, or something else, instead of the agreed vessels, could be exercised at *any time* within the agreed ninety-day period, and such barges could be secured by plaintiffs without knowledge on the part of the defendant; the result being that plaintiffs would have the power to alone fix upon a definite delivery date despite anything defendant could do to forewarn or apprise itself of such date. Defendant as a consequence would fail, at its peril, to be and remain prepared to make deliveries of the lumber, 60 M feet daily, commencing any time after September 30, 1917, and extending to the end of the ninety-day period. This statement, of course, is subject to the qualification that the specifications would have been furnished the de-

fendant beforehand. That, however, would be a matter also wholly within the plaintiffs' control. The giving of such uncontrolled right to the plaintiffs, by construction, would be unreasonable in a commercial contract of this nature. Furnishing mills could not do business under such conditions, nor was the granting of such an uncontrolled, independent right, ever contemplated by the parties, yet it is just such a one, necessarily accruing to the plaintiffs, under their contention that this was a sale of a definite number of feet of lumber to be taken delivery of on barges or other mediums besides the named vessels, *at their option*.

The testimony, on the contrary, showing the value to the defendant of being able to approximate, independent of the plaintiffs, the time when preparations must commence for supplying the cargo, clearly shows that the reasonable, natural construction points to the conclusion that the naming of the vessel as the receiving medium, *alone fixes*, for both buyer and seller, with reasonable accuracy, the time of the cargo's delivery and shipment. Buyer and seller have by their agreement approximated the date of the vessel's arrival within a period of ninety days, and her actual arrival, within such period, fixes the shipping and delivery date. Therefore, as we construe the agreement, the time of delivery of this cargo is conditioned by the naming of the "W. H. Marston", in that it is such time, within the period between October 1 and December 31, 1917, as such vessel shall have reached her loading dock. This *must* be the reasonable construction of a contract whose subject-matter is a *capacity* cargo, necessarily,

therefore, of an indefinite amount, of a commodity that must be cut and manufactured according to given specifications. Under no other construction could contracts, used in the cargo export trade, providing for long, yet undetermined, delivery and shipping dates, be carried out.

Were the delivery and shipping dates to be fixed by the independent and uncontrolled act of the *buyer*,—the seller would be put to an unreasonable disadvantage which would seriously, if not vitally, affect its power to do business, for when a delivery date is given, extending over a long period of time, the seller necessarily must be placed in a position where it can secure, independent of the buyer, information as to the approximate date it will have to begin to prepare the lumber for delivery. Were the delivery and shipping date to be fixed by the independent and uncontrolled act of the *seller*, the *buyer* also would be put to a similar disadvantage, in making his preparations for *receiving* the lumber.

It must be admitted that the agreed time of delivery and shipment in a contract of this nature, is a condition precedent upon the failure of which the party aggrieved may repudiate the contract. In the case at bar such time is fixed by the actual arrival of the “W. H. Mars-ton” at the Knappton dock between October 1 and December 31, 1917.

Norrington v. Wright, 115 U. S. 188, 222 (29 Law. Ed. 366);

Connell Bros. Co. v. Diedrichsen & Co., 213 Fed. 739;

Gray v. Moore, 37 Fed. 266;

Beck & Pauli Lith. Co. v. Col. M. & E. Co., 52 Fed. 700, 702.

Meier Dental Mfg. Co. v. Smith et al., 237 Fed. 563, 568.

SIXTH CONTENTION.

THE PLACE OF DELIVERY.

WE CONTEND THAT THE NAMING OF THE "W. H. MARSTON", ALSO CONDITIONED THE PLACE OF THE DELIVERY OF THE LUMBER, IN THAT IT WAS SUCH PLACE AT THE KNAPP-TON MILL WHARF AT WHICH DEFENDANT COULD EXERCISE ITS OPTION OF MAKING DELIVERY "F. O. B." MILL WHARF KNAPPTON, WITHIN REACH OF VESSEL'S TACKLES AND/OR ON BARGES "A. S. T.", MILL WHARF, KNAPPTON. (ASSIGNMENT OF ERRORS NOS. XV AND XIX, 8th AND 12th GROUNDS, AND XXVIII.)

We next take up the question of whether or no the naming of the "W. H. Marston" conditioned the place of delivery, for if it did, such naming was also in the nature of a warranty not to be waived by either party without the consent of the other.

Plaintiffs' contention, as to the *place* of delivery and shipment, is dependent upon establishing their further contention as to the *subject matter* of the sale, for if the subject matter of the sale is *a cargo* to suit the capacity of the "W. H. Marston", it follows necessarily that the place of delivery must be to that vessel. On the other hand, although it be decided, as contended for by plaintiffs, that the subject matter of the sale was 1300 M feet, 15% more or less, the question of the place of delivery

is still to be determined, for while if the sale is of a *cargo*, delivery *must* be made to the named vessel, still if the sale is of 1300 M feet, 15% more or less, the place of delivery may be either to the ship or something else. Therefore, if the contract is construed as a sale of a cargo to suit the capacity of the "W. H. Marston", that ends the matter. If the construction makes it a sale of 1300 M feet of lumber, 15% more or less, than we still contend that the delivery must be made to and the shipment by the named vessel.

For the convenience of the court we have attached to the end of this argument a diagram that shows roughly the places of delivery contended for by the respective parties, and it is vitally significant, as seen from this diagram, that there is perfect *unity of agreement* as to *one* of such places. Plaintiffs' complaint *alleges* and defendant's answer *admits*, that the provision of the contract reading: "*On barges a.s.t. Mill Wharf*" was "*understood by plaintiffs and defendant to mean*"; "*On barges at ship's tackles mill wharf*" (Complaint, Record, p. 6; Answer, Id. p. 17).

Plaintiffs have at this late date, however, become conscious of the danger found in this allegation of their complaint, and during the trial an ingenious attempt was made to destroy its effect. The contention being made that this phrase, "*on barges a.s.t. Mill Wharf*" was, a "*price term*", and it was said that in the cancelled Charles Nelson Contract, "*f.a.s. Mill*" was also used in connection with the price. Likewise, in the instant contract, on the authority of *Meyer v. Sullivan*,

supra, the phrase "on barges a.s.t. Mill Wharf", has nothing to do with the presence or absence of the named vessel. Let us demonstrate the fallacy of this argument:

Paralleled, the relevant clauses in the two contracts read as follows:

Nelson Contract:

"Price \$10.00 per thousand, base 'G' List less $2\frac{1}{2}$ and $2\frac{1}{2}$ f. a. s. Mill"
(Plaintiffs' Ex. 2, Record page 71);

Instant Contract:

"Price: \$9.50 Base 'G' List, less $2\frac{1}{2}\%$ and $2\frac{1}{2}\%$ for cash"
(Plaintiffs' Ex. 4, Record page 83).

The instant contract after next covering the subjects of, "Destination", "Grade", "Delivery", "Marking", "Shipment" and "Terms and Conditions"; has this:

"Notes: This price is for delivery F. O. B. Mill Wharf Knappton, within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf Knappton, Wash." (Id.)

On page 8 of the Record in paragraph X of the complaint, plaintiffs, referring to the substitute purchase for the "W. H. Marston", made from Dant & Russell December 7, 1917, allege:

"Said purchase price was, at the time of said purchase, a reasonable price for said 'Fir', and was at said time the prevailing market price in San Francisco of 'Fir' for delivery f.a.s. or f.o.b. mill wharf and/or on barges a.s.t. mill wharf. * * * "

It is thus obvious that plaintiffs in this last allegation intended to state the places of delivery called for by the contract, and as to the particular place, "on barges

a.s.t. mill wharf", plaintiffs allege that this was a place the meaning of which was "*understood by plaintiffs and defendant*" (Record, page 6).

We submit it is now too late to attempt to change this admitted optional mode of delivery reserved to the defendant, into a price term in order to escape the consequences arising from such mode of delivery being conditioned on the presence of the "W. H. Marston". This controversy, in a very material part, rests on the settled and admitted plea that one of the agreed and understood modes of delivery was "on barges at ship's tackles, mill wharf", and plaintiffs will find it difficult at this time to change this understanding, although the importance of doing so, now lies chiefly in the fact that instead of it giving to *plaintiffs* the right to *receive delivery* on barges (as was erroneously thought when the complaint was drawn), it now must be recognized that it gives to the *defendant* the right to *make delivery* on barges and at the tackles of the ship "W. H. Marston".

Nothing is clearer in this controversy than: (1) Defendant is given by the contract the *option* of making delivery "f.o.b. mill wharf Knappton within reach of of vessel's tackles and/or on barges a.s.t. mill wharf, Knappton, Wash."; (2) "This price (\$9.50) is for" such optional delivery; and (3) the pleadings show that both parties "understood" that "on barges a.s.t. mill wharf" means "on barges *at ship's tackles*, mill wharf". In this latter is found the true indicia of a contract,—namely, a meeting of minds, to the end that defendant is given the right of *making a delivery* of a

cargo to the "W. H. Marston" from barges at that ship's tackles at the Knappton mill wharf. How such a delivery could be made unless the ship was at such mill wharf, it is impossible to suggest. If, however, plaintiffs are to succeed in this case, this problem must find a reasonable solution: How can plaintiffs assert a right to *receive* on barges, with the "W. H. Marston" not present, and yet preserve to defendant the right to *make delivery* on barges, at that vessel's tackles, mill wharf?

Defendant has never waived this right, and it was never possible to exercise it, for the sole reason that the "W. H. Marston" was never at the mill wharf.

Referring again to the annexed diagram, it will be seen that the two remaining places of delivery, *contended for by plaintiffs*, are not places called for by *any provision of the contract*, for the reason that neither have any reference to the presence of a vessel. One such place of delivery is simply: "f.a.s. (eliminating from the meaning of these letters all reference to the presence of a vessel) mill wharf." The only two "f.a.s." provisions of the letter of November 2nd, however, cannot be so interpreted as to eliminate the idea of a vessel's presence. The plaintiff himself makes this perfectly clear when he testifies:

"You won't find a contract without something following 'f.a.s.' " (Comyn, Record p. 143).

While the two provisions themselves, read as follows:

(a) "Four cargoes fir f.a.s. Mill Wharves as follows:

'W. H. Marston', * * * '.

(b) Cargo to be furnished f.a.s. *vessel* at loading ports * * *” (Record, page 3).

Neither of the letters following that of November 2, 1916 (November 6th, 8th, December 8th), completing the contract, make any reference whatsoever to the phrase “f.a.s.” In the provision of the “Acknowledgment of Order”, dated December 8, 1916, reserving to defendant the right to *make* delivery from either the wharf or from barges, is found the phrases “f.o.b.” and “a.s.t.”, but with the former phrase is connected the expression, “within reach of vessel’s tackles” and the latter phrase means, “at ship’s tackles” (Id. 6).

The evidence of all the expert witnesses testifying on the subject is that there is no material difference between “f.a.s., within reach of ship’s tackles”, and “f.o.b. Mill Wharf, within reach of ship’s tackles”, and “on barges a.s.t. Mill Wharf”.

In all, the idea of the presence of a vessel prevails. How, then, can it be said that the place of delivery, called for by the contract is *alongside* the mill wharf, or on the mill wharf, vessel or no vessel? (See diagram.) Allegations of the complaint also follow this method of ignoring the vessel in stating the meaning of these trade terms, except in the single case of the delivery *on barges*, and plaintiffs’ demand in this case was for a delivery on barges *but not at ship’s tackles* (a.s.t.) and it was at the ship’s tackles that defendant’s option to deliver ran.

Construing the plain, unambiguous words of the contract, we believe that the court must find that in deter-

mining the place of the cargo's delivery, the presence of the "W. H. Marston" is indispensable, and that there is no material difference between contracts "f.o.b. within reach of vessel's tackles" and contracts "f.a.s. vessel"—in each there prevails the idea and necessity of a vessel's presence.

Furthermore, if the matters and things touching upon an exporting vessel as the receiving medium for this lumber are to be omitted in the construction of this contract, then neither the letter of November 6, 1916, or the answer of November 8, 1916, need have been written, nor need plaintiffs have found it necessary to offer defendant \$2500 for extending the "W. H. Marston's" loading date—there would have been neither loading date or loading place for that vessel.

Furthermore, as has already been suggested, aside from the "specifications", the other documents mentioned in plaintiffs' letter of September 19, 1917, would not have been required, for of what meaning are "bills of lading", signed by the ship's master, "demurrage releases", signed by such master, and "certificates" of a marine surveyor certifying to the proper loading of the ship, or the "stowage plan" of the ship—if the contract is one which is to be construed as permitting plaintiffs, without defendant's consent, to ignore the "W. H. Marston"?

Plaintiffs admitted that it was the original intention to load the lumber on both the "W. H. Marston" and the "W. H. Talbot", "*provided they came along in time*" (Comyn Record, p. 145), and the same witness

admitted that the contract was fulfilled, irrespective of whether there is in it a given number of feet of lumber, "*If it is a contract for a particular vessel, the contract is fulfilled when the vessel is loaded, if the contract is to suit her capacity, irrespective of whether it is a given number of feet in the contract, if it is a contract for a cargo by the vessel*" (Id. 151, 152). In face of the admission that it was the original intention to load the "W. H. Marston", plaintiffs' assertion now of the right to ignore that vessel, needs a more substantial explanation to support it than the vessel's failure to make her agreed loading date.

SEVENTH CONTENTION.

THE QUANTITY OF LUMBER SOLD.

WE CONTEND THAT THE TESTIMONY IS ALL TO THE EFFECT THAT IN CARGO SALES TO SUIT THE CAPACITY OF A NAMED VESSEL, IT IS IMPOSSIBLE TO KNOW THE EXACT AMOUNT OF SUCH SALES UNTIL THE VESSEL IS ACTUALLY LOADED. (ASSIGNMENT OF ERRORS NOS. VIII, XV AND XIX, 1st, 2nd, 3rd AND 4th GROUNDS.)

Here again we contend that the naming of the "W. H. Marston" conditioned the *quantity* of the lumber sold. There is so much already said that is applicable to this subject that we are glad to find it necessary to say but little more.

The evidence is conclusive that if the sale be a cargo for a named vessel, to be furnished in accordance with given specifications, neither the amount of such cargo or its invoice price can be ascertained except by first loading the named vessel.

"It is absolutely impossible to know in advance of the loading of a vessel what her capacity is" (Mansur, Record, page 217).

* * * * *

"Q. * * * I ask you why it was that in the specification you named the number of pieces, and in the pro forma bill of lading you left the number of pieces blank? Isn't it because you could not know until the vessel was actually loaded with this specification lumber, how many of the different pieces would have to be inserted in the bill of lading?"

A. Exactly, but the mill does not have to do that; our agent can insert that in the bill of lading. We don't have to send that bill of lading to the mill.

Q. And that is the reason, is it not, you could not tell until the vessel is actually loaded how many pieces of specification lumber would appear in the bill of lading?

A. No, not until the vessel is loaded" (Comyn, Record, pages 161, 162).

* * * * *

"I should say that it would be impossible to determine the exact amount of cargo sold under the contract prior to the actual loading of the vessel" (Griggs, Record page 183).

* * * * *

"It is impossible in a contract for cargo sales to suit the capacity of a named vessel to know the amount of lumber sold in advance of actual loading of the vessel" (Id. page 185).

* * * * *

"Under such a contract it is not possible to know how much lumber has been sold in advance of the actual loading of the vessel" (Ames, Record page 200). (See also, Baxter, Record page 225.)

* * * * *

"In this hypothetical contract which we have been speaking of, although there is a named amount

of lumber governed by the limitation of 15 per cent or less, you could not exactly tell just what that contract is going to invoice until the lumber is actually put into the vessel in the specification lengths, breadths and sizes" (Dant, Record page 126).

Mr. Dant was probably plaintiffs' most important witness.

Moreover, the amount of a cargo to suit the capacity of a named vessel is not the same for all loadings. Many matters affect the amount of a ship's *capacity* cargo.

"No vessel will carry the same amount of lumber twice in succession. She might carry a dozen cargoes and all vary, due to various conditions. For instance, we have loaded vessels time after time, contract after contract, and when they get down to their loading marks, still the deckload may be 18 inches lower than it was on some other trip on account of weather conditions, water, snow, ice, and there might be a great many things" (Ames, Record, pages 200, 201).

Mr. Mansur testified:

"Some vessels vary in their cargoes. I would say that the size of the lumber has a great deal to do with it, on account of the stowing in the hold, and then the climatic conditions have a whole lot to do, the rain falling, the lumber is soaked with rainwater and it is heavier. If it has snow on it, snow and water, it is heavier, and she don't carry so much. The question of stowage has something to do with the varying of the cargo capacity of a vessel" (Id. 217).

Mr. Baxter testified:

"A ship's capacity does not always remain the same, the loading capacity changes on the same

ship. A ship changes its loading capacity when it loads the same commodity, such as lumber'' (Id. 225).

Plaintiffs' witness, Mr. Dant, testified:

''No matter how well a vessel may be known to you, or how often you have used her, you can only approximate what she will load at a given time, within 5 or 10 per cent, maybe. I have known sailing vessels to carry 40,000 or 50,000 feet more at one time than at another'' (Id. 126).

Mr. Comyn, the plaintiff, testified:

''When we put into this contract 1300 M feet, that was what we have approximated to be her carrying capacity. This 15 per cent more or less was a leeway to be used *in the loading of the ship*'' (Id. 166).

From the foregoing evidence it is perfectly clear that in order to have ascertained the quantity of lumber sold under this contract the ''W. H. Marston's'' presence was required, and that even then such quantity could not have been determined until the vessel was actually loaded. The record, moreover, abounds with testimony to the effect that a capacity cargo for a named vessel loaded according to specifications, cannot be loaded on barges, unless the actual capacity of the vessel is first known.

We submit in conclusion of this subject that the naming and presence of the ''W. H. Marston'' at the agreed loading place conditioned the quantity of the sale and was, therefore, in the nature of a warranty which one party could not waive without the other's consent.

EIGHTH CONTENTION.

THE BENEFITS ACCRUING TO DEFENDANT THROUGH THE NAMING OF THE "W. H. MARSTON" AS THE RECEIVING MEDIUM FOR THE LUMBER.

In the argument at the trial of this case the statement was made that if a *single* benefit was shown to have accrued to the defendant through the naming and presence of the "W. H. Marston", such benefit could not be denied it without its consent. We wish here to reiterate such contention and submit it to be our considered belief that plaintiffs' case falls because it undoubtedly appears that in more than one particular the agreed presence of the vessel was of benefit to the defendant. These benefits we herewith briefly set forth for the court's assistance.

First Benefit. The naming and presence of the "W. H. Marston" was a guarantee and assurance to defendant that the cargo sold would be exported and the sale, therefore, would be such as was within the power of the defendant to make.

This was an exceedingly valuable benefit to defendant for it is a corporation composed of a combination of interests organized to do an export business only and deriving its powers to do such business, *as a combination*, solely from the act of Congress known as the Webb-Pomerene Bill (Act of April 10, 1918. Comp. St. U. S. Sec. 8836 $\frac{1}{4}$, a to e; Fed. Sts. Anno. 1918 Supp., page 246); this act being the culmination of the purpose and desire of the business interests of this country to secure the sanction of law for co-operation in the American export trade. The history of the Webb-Pomerene

Bill shows that it follows the recommendations, submitted to Congress in *May, 1916*, of the Federal Trade Commission after that Commission had investigated conditions that American exporters met in foreign markets. The bill passed the House of Representatives twice, once by a vote of 199 to 35, and again by a vote of 241 to 29, though its final passage by both House and Senate was not until April 10, 1918.

Second Benefit. The naming and presence of the "W. H. Marston" was of benefit to the defendant because it gave to it a means of ascertaining with some measure of accuracy the time between October 1st and December 31, 1917, at which it would be called upon to cut and furnish the specification lumber. The value of this to the defendant is shown by the following testimony given by plaintiff himself:

"It is certainly an advantage to the loading mill to know with measurable definiteness the time when they would be called upon to cut a cargo of lumber. The naming of an exporting vessel gives to the loading mill some measure of information on that subject. They can see where she is and follow her movements. They can get information from the "Guide" or some such paper or from the buyer. We have sold f.a.s. cargoes as a manufacturer. We have found that when we extend our delivery dates over a period of, say, 90 days, it is helpful to us, as a manufacturer, to know by examining the "Guide" and such papers when the carrying vessel will probably require the lumber, because you will then be guided as to when you shall begin to cut your lumber. It is a matter that the mill likes to know. They might slip in another cargo in the meantime. We have done that before. When we found a vessel was going to be late, we have taken

one out of order and put it in. It enables your mill to keep circulating right'' (Comyn, Record, pages 153-154).

Plaintiffs' witness, Mr. Dant, confirms this:

''The object of providing that long delivery date is the estimated time that the vessel will arrive at the loading port.

Mr. McCLANAHAN. Q. This order, then with the long delivery date, the named carrying vessel, and the amount of lumber purchased, is sent to the mill; is there any benefit that the mill derives in such an order through the naming of the vessel?

A. They can look the vessel up if they choose to keep track of the vessel.

WITNESS (continuing). They can find out when they will be called upon approximately to furnish the lumber. When they want that information they look up the position of the vessel, and they do that by an examination of the shipping papers, what we call the 'Guide'. The 'Guide' is a recognized shipping journal which keeps track of the movements of sailing vessels. When the mill has this order presented to it, that they are apt to be called upon in 90 days for the delivery of a certain amount of lumber to a particular named vessel, they can look up in the 'Guide' and find out approximately where that vessel is and then approximate when she will be due at the loading port. That is of value to the mill, in that it gives the mill some idea as to when it shall commence to cut and have the lumber ready'' (Record, pages 122, 123).

The value of this ability to forecast the time when it would be called upon to commence preparations for the delivery of the cargo is illustrated in the case at bar. On September 20, 1917, having been furnished with the specifications, defendant deferred commencing the lumber's preparation with safety, until there came a time

when the possibility of the vessel reaching the loading port had vanished. Defendant, therefore, was saved the necessity of having to meet the embarrassing situation that would have arisen had it proceeded cutting the cargo and then at the end found that the vessel would not reach her loading dock in time to take delivery of it in accordance with the contract.

“We did not commence to cut this lumber in accordance with the specifications on the 1st of October, because the position of the vessel was such that we did not think she would make her loading date” (Baxter, Record, page 227).

Third Benefit. The naming and presence of the “W. H. Marston” was of benefit to the defendant because it gave it some idea, derived from the record of the vessel’s previous loadings, of how much lumber the mill would have to cut. If the sale, at the buyer’s option, was of 1,300,000 feet, 15% more or less, as contended for by plaintiffs, it would not have been known within a limit of 30% what the plaintiffs would demand.

Fourth Benefit. The naming and presence of the “W. H. Marston” was of benefit to defendant because it was in a measure an assurance against speculation on the part of the plaintiffs.

If the sale, at the option of the plaintiffs, was of 1,300,000 feet, 15% more or less, without reference to its being a cargo for a named vessel, there would be a 30% margin for speculation. As, for instance, if the market rose, the buyer would demand the 15% more, if it fell he would demand the 15% less. The provision of the contract “15% more or less”, if it did not give the

buyer this right of speculation, would mean nothing, and the contract would more properly be for the sale of 1,300,000 feet and nothing else. On the other hand, the seller would have no such option. With the naming of a vessel and the sale of a capacity cargo for that vessel, both parties would be on an equal footing as to the amount of the sale, and there would be no room for speculation on the part of either buyer or seller.

The plaintiff, Mr. Comyn, on the theory that this is a sale of 1,300,000 feet, 15% more or less, recognizes the speculative advantage he would derive from such a purchase. In speaking of the reason the phrase "15% more or less" is used, he says:

"That is one of the ways we sometimes make more money. It gives you a speculative contract with a leeway of 30 per cent" (Comyn, Record, page 151).

Although plaintiffs are asking for a judgment based on a sale of 1,300,000 feet, nevertheless the court is not so much interested in the amount the plaintiffs are *willing* to call the sale, as it is in the amount the contract *permits* it to be called. The limitation of 15% more or less, if it is not a part of the contract to be used for the purpose of an estimate of the approximate amount the mill will be called upon to furnish, as a capacity cargo for the named vessel, then it can be nothing else than a margin within which the buyer may speculate. It cannot be ignored. If it is not construed to be an estimate, then it must be held to be a speculative margin, and the amount of the sale will therefore depend upon the rise and fall of the market.

We predict that the court will hesitate before giving judgment on any such construction, which we believe clearly would make the contract illegal and unenforceable.

Fifth Benefit. The naming of the "W. H. Marston" was of benefit to the defendant because, as is shown by the "f.o.b." cases herein cited, a stipulation respecting the *place or mode* of delivery in sales contracts of the nature of the one at bar is always construed as for the benefit of both parties. Here the *place* of delivery was the vessel at mill wharf, and the *mode* of delivery was from such mill wharf and/or on barges there, at the ship's tackles, at the seller's option.

NINTH CONTENTION.

WE CONTEND LASTLY THAT IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO DEDUCT 15% FROM THE FINAL JUDGMENT OF \$17,592.72, THEREBY MAKING SUCH JUDGMENT THE MINIMUM IN AMOUNT. (ASSIGNMENT OF ERRORS NO. IX.)

On plaintiffs' contention that the subject matter of the contract was "1,300,000 feet, 15% more or less"; the court's final judgment is based upon the exclusion of all related words and phrases, and stands as a judgment for failure to deliver *exactly* 1,300,000 feet of lumber. Not only does the court's judgment exclude consideration of the related words of the contract, "15% more or less to suit capacity of vessel", but it also excludes consideration of the phrase, "15% more or less", which is so closely related to plaintiffs' *contention* as to what the subject matter of the sale is.

It will first be noted that in plaintiffs' letter of October 10, 1917 (plaintiffs' Exhibit No. 12, Record, page 97), they squarely intimate that if their contention as to the subject matter is correct; it allows defendant the privilege of taking advantage of the limitation phrase and making delivery of 1,300,000, *less 15%*. The same construction was followed after suit was brought, for counsel will not deny that this was their view in the printed brief on plaintiffs' demurrer to defendant's answer: "*It was obligated to deliver at least 15% less than 1,300,000 feet, in any and every event*" (page 17), is but one of several statements of like import in said brief.

It is perfectly obvious that in reaching the exact amount of the money judgment in this case, the court's construction of the subject matter of the sale led it to ignore entirely the words of the agreement, "*15% more or less to suit capacity of vessel*". We contend, however, that this was manifest error, for although the subject matter of the sale, *in the absence of the schooner "W. M. Marston"*, is held to be 1,300,000 feet of lumber, nevertheless, when it comes to pronouncing a money judgment against defendant for breach of its contract, the limitation of 15% should have been recognized, for the reason that the schooner's *absence*, which alone made possible the findings as to the subject matter, was the result of the act of plaintiffs alone, and incidentally they profited by it to the extent of \$5,000.00. It would seem but common justice to deny the plaintiffs the right to ignore the 15% limitation, in view of the circum-

stances under which the "W. H. Marston" was delayed and the plaintiffs were profited.

We have cited in this brief a number of cases bearing on the subject matter of the instant contract and we have done so in the belief that they will be of assistance to the court in finding that a cargo for the "W. H. Marston" was the subject matter of the contract and not 1,300,000 feet of lumber. Such a finding ends the case. If, however, this court shall approve of the lower court's finding as to the subject matter of the sale; these cases which we have cited will not be relevant to the subject of the proper amount of the money judgment to be given herein. A very recent English case, which is squarely in point, is published in the December, 1920, issue of *The Times Reports of Commercial Cases* and will be reported as *Thornett and Fehr v. Yuills*, 26 Com. Cas. 59.

The material part of the contract in that case is stated as follows:

"1. By a written contract dated April 16, 1919, Thornett and Fehr, of London, the buyers, contracted to purchase from Yuills, Limited, of London, the sellers, 200 tons, five per cent more or less, of Australian double triangle T or double triangle B beef tallow, fair average quality of the brands 1919 make, at 72/- per cwt., ex ship, landing weights, shipping tares: cost freight and insurance paid to the United Kingdom".

For reasons held immaterial the sellers failed to deliver all the cargo and one of the questions in the case was whether they were at liberty to supply only 190

of the 200 tons under the "five per cent more or less" clause.

The parties went to arbitration and, on the point in question, the arbitrators held as follows:

"9. We are of opinion that the phrase '5 per cent. more or less' operates merely to cover accidental or inadvertent variations from the quantity stated in the contract and does not entitle a seller to deliberately supply either more or less than the contract quantity".

On appeal counsel for the buyers stated that "As to the 5 per cent clause, the effect of such a clause has never been decided. There is no evidence of any customary meaning of the words, but the natural meaning to be given to them is that which the arbitrators have given".

The Earl of Reading, the Lord Chief Justice of Great Britain, delivered the opinion of the court and, on the point now in question, said:

"The remaining question is, what is the effect of the clause as to delivery of 200 tons, 'five per cent more or less'. The meaning of that clause is that the sellers are bound to deliver at least 190 tons, and may if they please deliver any further amount to make the total as much as 210 tons. The sellers have the right to decide how much they will deliver within the given margin, and I do not agree with the arbitrators in thinking that the words 'five per cent more or less' only cover accidental or inadvertent variations from the contract quantity. All that the sellers here are bound to deliver is 190 tons, and the court cannot inquire whether the shortage is accidental or deliberate. If at least 190 tons had been delivered the contract would have been performed, and the damages here can only be

damages for non-delivery of the 29 tons outstanding beyond the 161 tons which the sellers are ready and willing to supply.”

The only possible distinction between this case and the one at bar lies in the super added words in the case at bar: “to suit capacity of vessel.” But surely, if plaintiffs, who had the sole power of producing the vessel, did not produce her, they cannot claim an advantage on that account. The vessel not being there, the words in question must, on the construction adopted by the trial court, be treated as non existent.

See also:

W. R. Grace & Co. v. Jules Maes & Co., 183 N. Y. Sup. 105;

Levin & Co. v. North Adams Mfg. Co., 178 N. Y. Sup. 607;

Washington Lumber Co. v. Midland Lumber Co., 194 Pac. 777;

Consol. Water Co. v. Louisville Herald, 211 Ills. App. 569; Ills. Notes, Digest, Vols. XI to XV, and Cumulative Quarterly.

We submit in conclusion of this subject that, if the trial court's judgment is to be sustained, it should first be reduced by \$2,626.65, this being 15% less than the judgment as it now stands.

CONCLUSION.

In conclusion of the entire brief we submit that both the law and the facts governing this case call for the re-

versal of the judgment rendered herein and that it be held further that defendant is entitled to judgment for its costs in both courts.

Dated, San Francisco,
October 8, 1921.

Respectfully submitted,

CHICKERING & GREGORY,
McCLANAHAN & DERBY,
Attorneys for Plaintiff in Error.

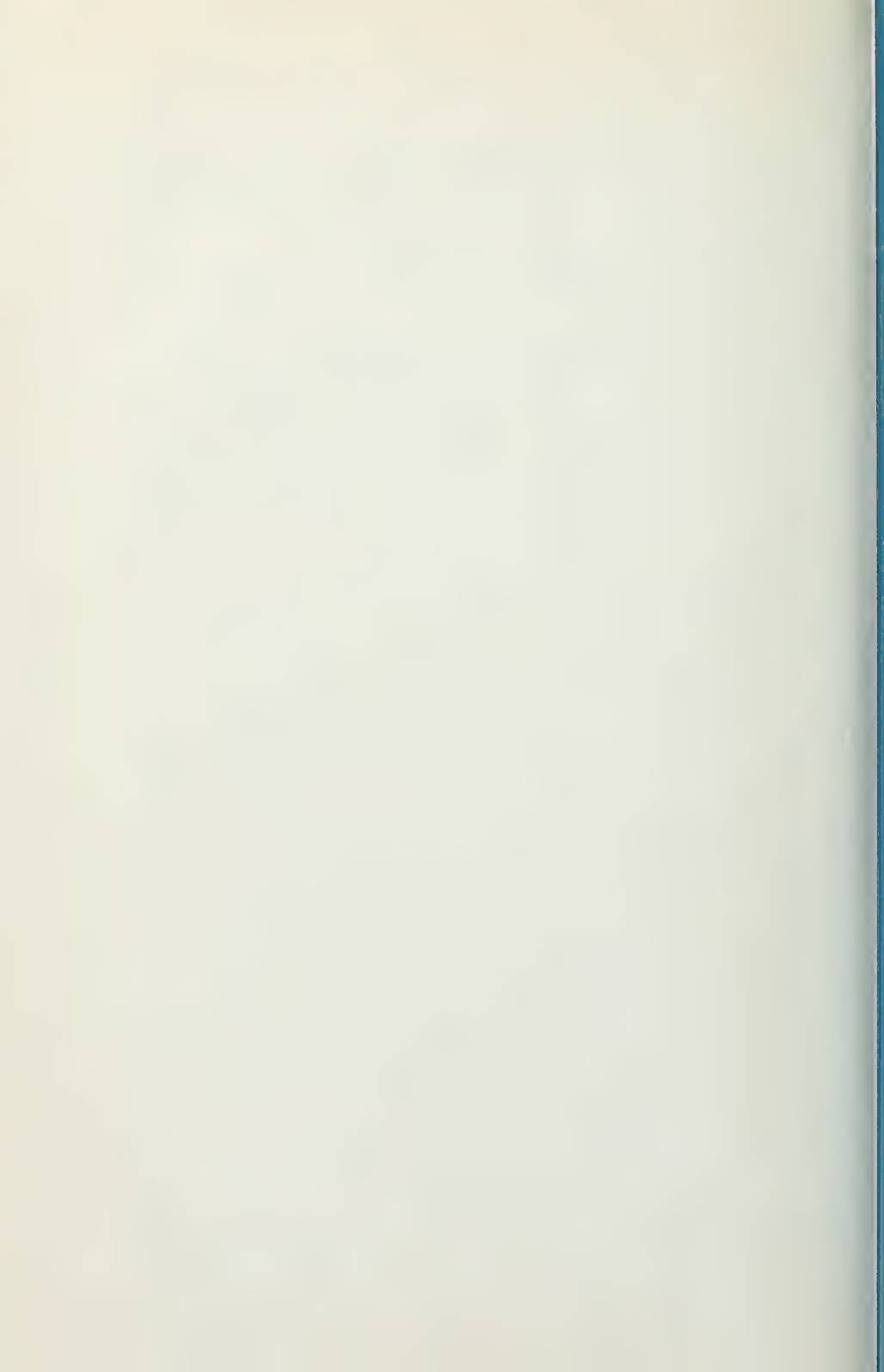


Diagram.

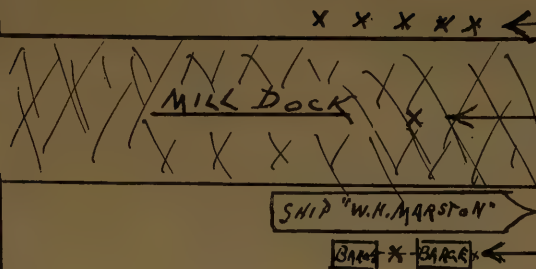
PLACES OF DELIVERY OF CARGO
AS CONTENDED FOR BY RESPECTIVE PARTIES.

PLAINTIFFS' (BUYERS') PLACES
THREE PLACES, *ful*

"A.A.S."
free alongside, mill wharf.

"A.O.B."
free on board, mill wharf.

"A.S.T."
on barges, at ship's tackle, mill wharf.

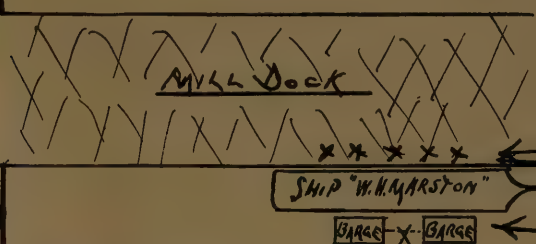


DEFENDANT'S (SELLER'S) PLACES.
TWO PLACES (OPTIONAL WITH SELLER), *ful*

"A.A.S."
free alongside ship, mill wharf.

"A.O.B."
free on board, mill wharf, within reach of vessel's tackle

"A.S.T."
on barges, at ship's tackle, mill wharf.



Note: On the barges and on the dock, within reach of ship's tackle, are the two optional places reserved by the Seller in the "Acknowledgment of Order" of Dec. 8th.



No. 3753

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DOUGLAS FIR EXPLOITATION & EXPORT COMPANY
(a corporation),

Plaintiff in Error,

vs.

W. LESLIE COMYN and BENJAMIN F. MACKALL,
co-partners doing business under the firm name
of COMYN, MACKALL & COMPANY,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

E. S. PILLSBURY,

F. D. MADISON,

ALFRED SUTRO,

H. D. PILLSBURY,

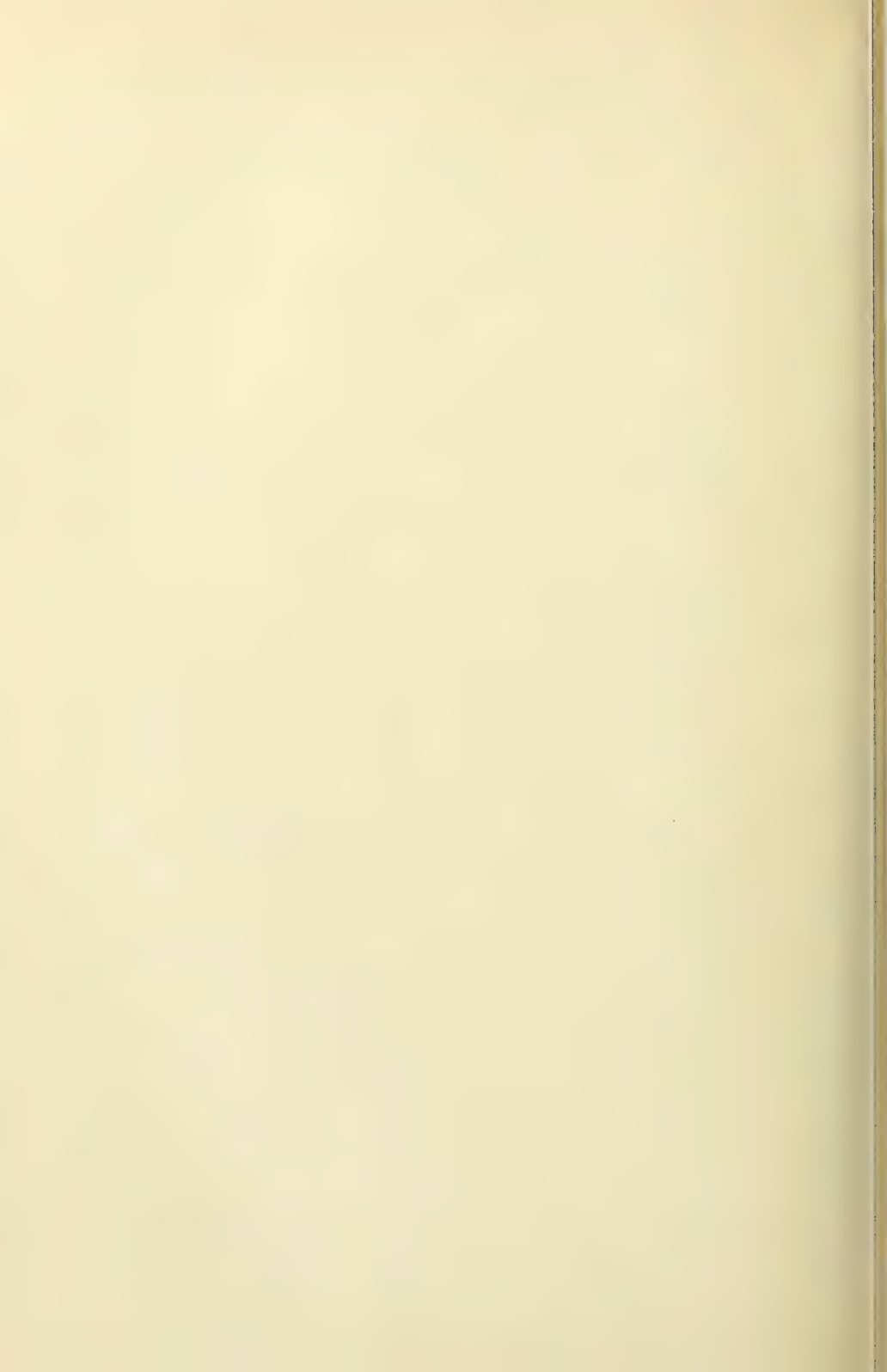
OSCAR SUTRO,

Attorneys for Defendants in Error.

FILED

OCT 24 1927

F. D. MONCKTON,
CLERK



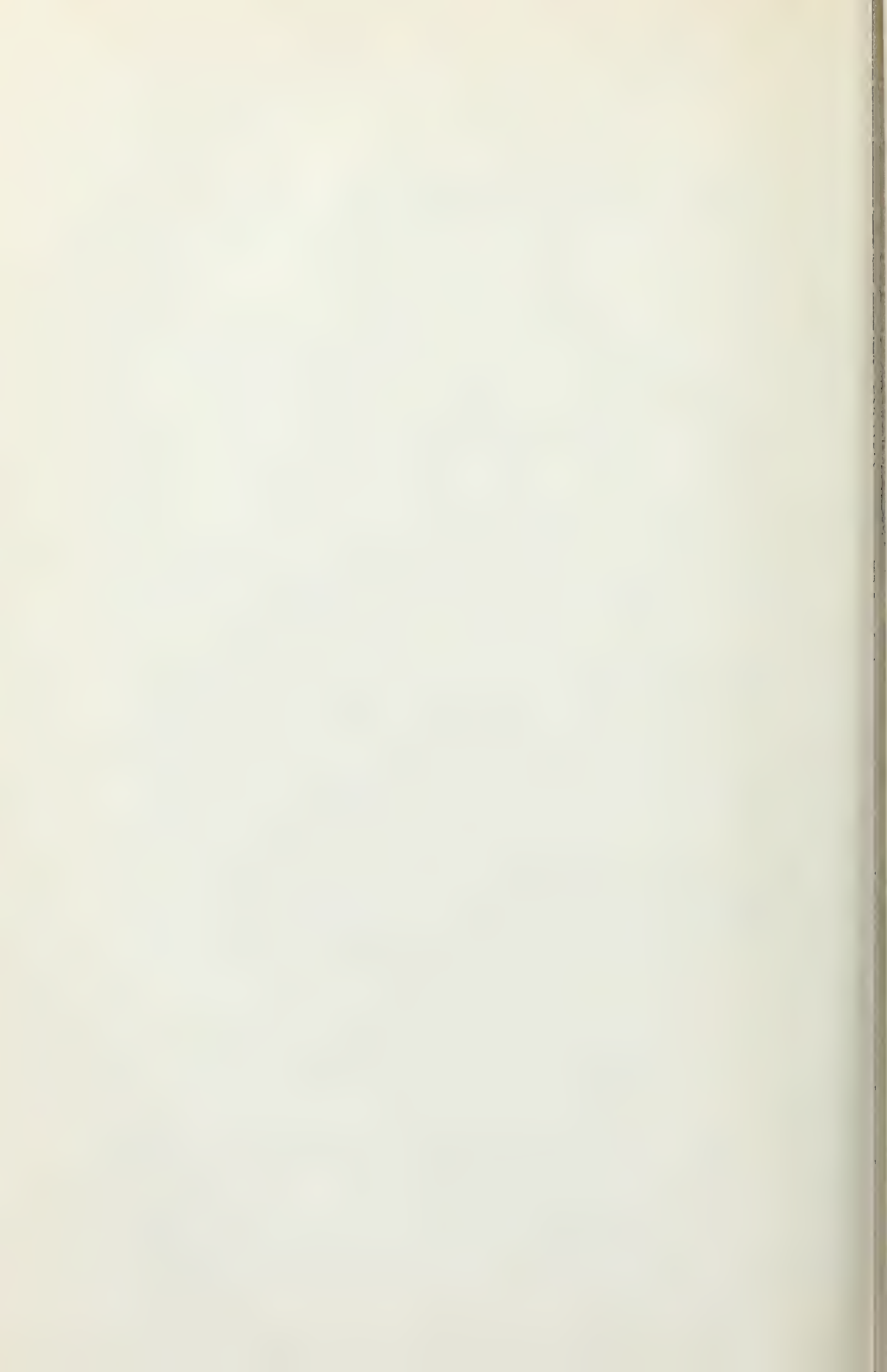
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No. 3753

IN THE

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For the Ninth Circuit

DOUGLAS FIR EXPLOITATION & EXPORT COMPANY
(a corporation),

Plaintiff in Error,

VS.

W. LESLIE COMYN and BENJAMIN F. MACKALL,
co-partners doing business under the firm name
of COMYN, MACKALL & COMPANY,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

The Facts.

The contract is set forth in various letters exchanged between the parties. For convenience we have retained the designation of plaintiffs as such and of defendant as such as these parties appeared in the court below.

The complaint pleads defendant's confirmation of the order, which was as follows:

“DOUGLAS FIR EXPLOITATION & EXPORT Co.
 260 California Street
 San Francisco, Cal. November 2, 1916.
 Messrs. Comyn, Mackall & Co.,
 310 California St.,
 City.
 Gentlemen:

Sold prior to October 11, 1916.

This will confirm sale to you of four cargoes
 Fir F. A. S. mill wharves as follows:

‘W. H. Marston’ 1300 M October to December 1917
 ‘W. H. Talbot’ 1300 M “ “ 1917

(Quotations subject to change without notice. All agreements are contingent upon the acts of God, riots, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes of delay beyond our control.)

and two of your own vessels to be named later, with a combined capacity of 1450 M, both for loading October to December, 1917, cargo to be furnished F. A. S. vessel at loading ports at 60 M daily in Puget Sound, Columbia or Willamette Rivers, Gray’s Harbor and Willapa at our option, but one loading port only for each vessel, loading port to be named by us in ample time to give vessel instructions before leaving her next previous port of call.

Tally and inspection by Pacific Lumber Inspection Bureau at loading port. Certificate to be furnished and to be final. Price \$9.50 base ‘G’ list less 2½%, 2½% cash. Marking if required, distinguishing mark at 10¢ per M. extra cost.

Written in duplicate. Please approve and return one copy.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT Co.,

By A. A. Baxter,

AAB-D

General Manager.”

(Italics ours.)

Thereafter plaintiffs approved this order (Record p. 68). On December 15, 1916, defendant sent the follow-

ing "acknowledgment of order", which was accepted by plaintiffs:

"Douglas Fir Exploitation & Export Co.
260 California St.,
San Francisco, Cal.

ACKNOWLEDGMENT OF ORDER.

Date December 8, 1916. Our No. 38 page 1

Your Order No. Dated

Knappton Mills & Lumber Company.

Sold to Comyn, Mackall & Company.

For account of

To be delivered at Knappton, Wash.

For reshipment to

Time of shipment October to December, 1917.

Time of delivery do

Mill tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per his confirmation irrespective of original order unless advised to the contrary by you.

Sch. 'W. H. Marston'

1,300,000 feet B. M. 15% more or less
to suit capacity of vessel.

Price: \$9.50 Base 'G' List, less 2½% & 2½%
for cash.

Destination: Australia. (Usual Australian Specifications)

Grade: As per 'G' List, P. L. I. B. Certificate
to be furnished.

Delivery: 60 M feet per working day or pay demurrage as provided by Charter Party.

Marking: Marking if ordered, 10 cents per M,
Net Cash.

Shipment: October to December, 1917.

Terms and

Conditions: As per 'G' List.

Notes: *This price is for delivery F. O. B. Mill Wharf, Knappton, within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf, Knappton, Wash."*

Accepted: COMYN, MACKALL & Co.,
Per J. Claude Daly.
Dec. 28, 1916."

(Italics ours.)

(Record p. 82.)

The document dated November 2, 1916, contains the phrase "sold prior to October 11, 1916." It was shown on the trial that this referred to the following facts: Plaintiffs had entered into an engagement with The Chas. Nelson Company, set forth in the following letters:

"October Seventeenth, 1916.

Messrs. The Chas. Nelson Co.,
San Francisco, California.

Dear Sirs:

Confirming the writer's conversation with your Mr. Baxter today, we have purchased:

3500 M 10% more or less Oregon.

Shipment and/or loading—July to December, 1917.

Price: \$10.00 per thousand base 'G' List less $2\frac{1}{2}$ and $2\frac{1}{2}$ f. a. s. mill.

Port of Loading—It is your option to load the above on Puget Sound, Columbia or Willamette Rivers or on Grays or Willapa Harbor, always provided of course that we have the right of loading at these places in Charter Party.

This contract is in duplicate, one of which we have signed, and shall be pleased if you will complete and return the other at your convenience.

Very truly yours,
COMYN, MACKALL & Co.,
Per C. L. Daly."

(Italics ours.)

“October Seventeenth, 1916.

Messrs. The Chas. Nelson Co.,
San Francisco, California.

Dear Sirs:

Referring to the contract enclosed covering purchase of 3500 M of Oregon it is probable that we will load under this contract the ‘W. H. Marston’ October/November/December and the ‘W. H. Talbot’ for the same loading. On both of these vessels we have the option of loading on Puget Sound or Columbia or Willamette Rivers. On the balance of the contract we may put in two (2) of our own vessels, estimated about 1450 M capacity, October/November/December, which can load at any of the several ports mentioned in the contract.

Very truly yours,

COMYN, MACKALL & Co.,
Per C. L. Daly.”

(Record pp. 71-72.)

Defendant, which was a combination of lumber companies, of which The Charles Nelson Company was one, took over the obligation to deliver the lumber (Record pp. 74-5, 220). Defendant prepared the sales memorandum (Record p. 71) dated November 2, 1916 (*supra*), wherein the two vessels were named which plaintiffs had indicated in their letter of October 17, 1916, as those which they would probably use for two cargoes. The names of the other two were to be furnished “later”. At the date of the contract plaintiffs did not know what vessels they would use (Record pp. 76-7).

It should be noted (a) that the quantity was specified at 1300 M or 1,300,000 feet for the “Marston”, 1000 M or 1,000,000 feet for the “Talbot”, and 1450 M or 1,450,000 feet for the combined capacity of the other two vessels “to be named” (Record p. 80); (b) that

plaintiff acknowledged receipt "*of your sale note covering 3500 M 15% more or less October to December, 1917*", and (c) that this confirmation was in turn acknowledged by defendant. The contract was thus made.

The defendant which selected the mills at which the lumber was to be cut thereupon notified plaintiffs as follows:

Plaintiffs' Exhibit No. 3.

"DOUGLAS FIR EXPLOITATION AND EXPORT Co.

December 15, 1916.

Comyn, Mackall & Co.,

City.

Gentlemen:

We enclose herewith the following orders:

Order #39-Schr. 'W. H. Talbot': We have placed this with the Raymond Lumber Co. of Raymond, Wash.

Order #40; Vessel to be named—725M: We have placed this cargo with the Hanify Co. at Raymond, Wash.

Order #41; Vessel to be named—725M: We have placed this with the Kleeb Lumber Co., South Bend, Wash.

Order #38: Schr. 'W. H. Marston': We have placed this cargo with the Knappton Mills and Lumber Co. at Knappton, Wash.

Would ask you to sign the acceptance copy of these orders and return same for our files.

Thanking you for the business, we remain,

Yours very truly,

DOUGLAS FIR EXPLOITATION & EXPORT Co.,

By D. C. Thompson."

(Record pp. 80-81.)

These orders plaintiffs accepted.

In August and September, 1917, it became obvious that the "Marston" would not reach the Pacific Coast

before the end of the year, and that therefore plaintiffs would be unable to load her with the lumber which defendant had agreed to deliver.

In their letter of September 19, 1917, addressed to defendant plaintiffs enclosed specifications for 1,300,000 of lumber which they desired to load on to the "Marston", and asked for bills of lading, inspection certificate etc. (Record p. 91). Defendant having indicated a refusal to deliver the lumber because of the position of the "Marston", plaintiffs requested delivery f. a. s. mill wharf or on barges (Record p. 95).

Under date of October 1, 1917, defendant refused to make such delivery (Record p. 96).

Thereupon there were further requests (see plaintiffs' letter October 10, 1917, and October 23, 1917, Record pp. 97, 105) and refusals (defendant's letter October 12, 1917, and October 19, 1917, Record pp. 99, 100-101).

It thus appears that defendant took the position that it was not bound to deliver the lumber unless plaintiffs were prepared upon its receipt to load it on the "Marston". Plaintiffs claimed that they were entitled to the lumber on the mill wharf or on barges, regardless of the presence or absence of the "Marston". Defendant did not cut or cause the lumber to be cut although the specifications were furnished in ample time (Record pp. 274, 109-110), and refused to place it on the mill wharf or on barges, because plaintiffs were not ready to transfer it to the "Marston".

The lumber market had increased from the price named in the contract, \$9.50 a thousand, to \$22.50 a

thousand (Record p. 102). Plaintiffs supplied themselves in the open market, paying \$22.50 a thousand or \$17,511 (Record pp. 111 to 114) over the price fixed by their contract with defendant. Thereupon they brought this action.

The Issue.

The question presented for decision is the sole issue:

Was it essential to plaintiffs' right to delivery of the lumber in question that the schooner "Marston" should be alongside the wharf at Knapppton or alongside the barges when delivery of the lumber was demanded of defendant

The Argument.

We respectfully submit that the question was correctly resolved in the opinion rendered by Judge Van Fleet upon demurrer to the complaint, and in the memorandum opinion filed by Judge Bean upon decision of the case.

The opinion of Judge Van Fleet, rendered October 21, 1918, was as follows:

"The COURT (orally). This action arises out of a breach of contract for the delivery of certain lumber. The contract stipulated that the lumber was to be delivered at the wharf of a certain port, or on barges alongside the wharf, convenient to ship's tackle, and the contract specified the vessel by name. The complaint is demurred to upon the ground that it fails to state that the vessel mentioned in the contract was at the point of delivery at the time, the contention being that that is an essential feature of

the contract under the law, and that plaintiff must allege the presence of the vessel ready to receive the lumber. I am unable to give that construction to the contract. I think that the express provisions of not only the original contract but the subsequent notification that defendant was ready to deliver, which specifies the wharf or barges alongside the wharf as the place of delivery, is the substantive requirement of the contract; that the provision as to the lumber being delivered convenient to ship's tackle was one which was for the benefit of the plaintiff here, the party who would receive the delivery, and it is not one upon which the defendant may rely. The demurrer will accordingly be overruled."

The opinion of Judge Bean, rendered in this case on December 28, 1920, was as follows:

"MEMORANDUM BY BEAN, District Judge:

As appears from the findings of fact herewith filed, the single question for decision is whether the failure of plaintiff to have the Marston at the mill wharf ready to receive cargo within the delivery dates specified in the contract relieved the defendant from the obligation to make delivery as demanded. In other words, whether the plaintiff could legally require delivery without furnishing the named vessel as the receiving medium. This question in substance was decided by Judge Van Fleet adversely to defendant on demurrer to the complaint. In his opinion I fully concur. The naming of the vessel in the contract, in my judgment, was a stipulation for the benefit of plaintiff and could be waived by it. (*Ellsworth v. Knowles*, 97 Pac. 690; *Meyer v. Sullivan*, 181 Pac. 847; *Harrison v. Fortlage*, 161 U. S. 64.) It does not affect the identity of the subject matter nor the time and place of delivery. The failure of plaintiff to furnish the named vessel did not add anything to the obligations of defendant. It was in no way important to it wheth-

er the buyer transferred the lumber to the Marston or to some other carrier, so long as it did not impose upon it any additional expense or undue delay. It would have fully discharged all the obligation on its part if it had cut and delivered the lumber on the wharf or on barge as demanded by plaintiff. The fact that the parties contemplated that the lumber would be loaded on the Marston did not make the Marston a necessary feature of the performance of the contract by defendant, or a condition precedent to defendant's obligation to make delivery. The provision f. o. b. mill wharf 'within reach of ship's tackles' or 'on barges a. s. t. mill wharf' did not affect the seller's obligation to deliver on the mill wharf or on barges. The delivery would be complete and its obligations discharged as soon as the lumber was placed on the mill wharf or on barges at mill wharf and accepted by plaintiff. It was wholly immaterial whether plaintiff used the Marston or some other receiving medium for shipment of the lumber.

It is claimed that the contract was for a cargo sale and that the capacity of the Marston was the measure of the quantity to be delivered but the contract names the quantity, and the expression therein '15% more or less to suit capacity of vessel' would simply allow the specified quantity to be varied to that extent, if the named vessel had been tendered as the receiving medium, but the failure to tender it would not relieve the defendant from making delivery if demanded of the specified quantity.

It is also said that the time and place of delivery was affected by the naming of the Marston, but these matters are both fixed by the contract, and plaintiff offered to take delivery as therein specified.

Defendant's motions for nonsuit and directed verdict are therefore denied and overruled, and judgment will be entered for plaintiff as prayed for."

These decisions sustain our contention that as the delivery contracted for was "f. o. b. mill wharf" "and/or

on barges mill wharf", the fact that the "Marston" was not there could not justify defendant's refusal to make the delivery; that the provision that the delivery should be within reach of the "Marston's" tackles was wholly for the plaintiffs' benefit; that the "Marston's" presence was not a condition precedent which would justify either party in refusing to perform; that if it was a condition precedent, being for plaintiffs' benefit, plaintiffs could waive the condition.

The naming of the vessel here in no way affected or conditioned defendant's performance of the contract. The cases where deliveries are to be f. o. b. a vessel, so that without the presence of the vessel performance is obviously impossible, are not analogous (*infra*).

As we have seen, the contract is contained in the two instruments, one dated November 2, 1916, and one dated December 8, 1916, which we have quoted. The first instrument provides for the sale of four cargoes mill wharf free alongside ship as follows:

"W. H. Marston" 1300 M October to December, 1917,

"W. H. Talbot" 1000 M October to December, 1917, and two vessels "to be named later,* with a combined capacity of 1450 M, both for loading October to December, 1917".

In the document dated December 8, 1916 (which it is provided shall supersede the earlier paper), and which contains the acknowledgment of the order, it is provided that the cargo is to be delivered at Knappton, Washington. The closing paragraph is:

* Which indicates the immateriality to the seller of the names of the vessels.

“This price is for delivery f. o. b. mill wharf, Knappton, within reach of vessel’s tackles and/or on barges a. s. t. mill wharf, Knappton, Wash.”

We submit that the mention of the schooner “Marston” in these instruments neither fixed the quality of the cargo to be delivered, nor the quantity, nor the time of delivery nor the place of delivery.

The defendant selected the mills at which the lumber was to be cut. For each lot of lumber it issued a separate acknowledgment of order. It is interesting to note that the contracts for lumber which plaintiffs intended to load on the vessels *not known to them or named by them* are in the precise form of the acknowledgment of the order for the lumber which plaintiffs wished to load on the “Marston”.

One of these acknowledgments appears in the record (Record pp. 86-87) with a stipulation that the other was in similar form. We quote the one appearing in the record:

Plaintiff’s Exhibit No. 6.

“ACKNOWLEDGMENT OF ORDER.

Douglas Fir Exploitation & Export Co.
260 California St.
San Francisco, Cal.

Our No. 41, page 1.
Date December 8, 1916.
Your Order No.....
Dated.....

Kleeb Lumber Company.
Sold to—Comyn, Mackall & Company.
For Account of—
To be delivered at South Bend, Wash.
For reshipment to—
Time of Shipment October-July to December, 1917.
Time of Delivery do

Mill tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per confirmation irrespective of original order unless advised to the contrary by you.

Pieces.	Feet.	Size.	Length.	Description.
---------	-------	-------	---------	--------------

VESSELS TO BE NAMED.

725,000 feet B. M. 15% more or less to suit capacity of vessel.

Price: \$9.50 Base 'G' List, less 2½% & 2½% for cash.

Destination: Australia or West Coast. (Usual Specifications.)

Grade: As per 'G' list, P. L. I. B. Certificate to be furnished.

Delivery: 60 M feet per working day or pay demurrage as provided by Charter Party.

Marking: Marking if ordered, 10 cents per M, Net Cash.

Shipment: October-July to December, 1917.

Terms and

Conditions: As per 'G' list (Our letter A 425).

Notes: This price is for delivery F. O. B. Mill Wharf, South Bend, Wash., within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf, South Bend, Wash.

Accepted: COMYN, MACKALL & Co.

Per J. Claude Daly.

Dec. 28, 1916.

Please return for our files:

Douglas Fir Exploitation & Export Co.

Note

Refer to E. G.

O. K.—E. R. G.”

(Record pp. 86-87.)

A case very similar to the case at bar is *Meyer v. Sullivan*, 40 Cal. App. 723; 181 Pac. 847. There a sale was of 250 tons of wheat f. o. b. Kosmos line steamer. No Kosmos liner could be produced. Buyer demanded delivery "in the manner customary on Puget Sound, viz., in warehouse there". The court held that delivery on the steamer was for the buyer's benefit, and that the seller could not avoid his contract because the steamer was not there. The court there said:

"The witnesses on the part of the defendants testified as to the use of the terms f. o. b. and 'f. a. s.' (free-along-side) in contracts. The evidence discloses that contracts might be made, between buyer and seller, using either of these terms, although sales f. a. s. seem to be of infrequent occurrence, and not readily made in the community. In both f. a. s. sales and f. o. b. sales, however, the seller of the goods pays the cost of all handling on the dock; and the cost of stevedoring, or transferring the cargo from the dock to the ship is paid and absorbed by the shipowner from the freight, which in turn is paid by the buyer. The only distinction between the two kinds of sales appears to be as to the time when the responsibility of the seller ends. In the case of f. a. s. sales, it seems to end with delivery on the dock. In the case of f. o. b. sales, the responsibility of the seller appears to end when the commodity is on board ship. The element of cost, to either buyer or seller, does not appear to enter into the matter at all."

And again:

"In arriving at this conclusion, the trial court was assisted by the position of the clause in the contracts, used, as it was, in connection with the words fixing the price of the wheat sold. The general rule seems to be that

'If the agreement is to sell goods "f. o. b." at a designated place, such place will ordinarily be regarded as the place of delivery, but the effect of the "f. o. b." depends on the connection in which it is used, and if used in connection with the words fixing the price only, it will not be construed as fixing the place of delivery.' 35 Cyc. 174; Neimeyer Lumber Co. v. Burlington & M. R. R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; Burton et al. v. Nacogdoches Lumber Co. (Tex. Civ. App.), 161 S. W. 25.

In Dannemiller v. Kirkpatrick, 201 Pa. St. 218, 50 Atl. 928, the contract read: 'Bill the cargo of coffee at the same price, f. o. b. Pittsburgh.' It was held that whether or not delivery was to be made at Pittsburgh was a question of fact. To like effect are Consolidated Coal Co. v. Schneider, 163 Ill. 393, 45 N. E. 126; Davis v. Alpha Portland Cement Co. (C. C.), 134 Fed. 274; U. S. Smelting Co. v. American Galvanizing Co. (D. C.), 236 Fed. 596. These authorities seem to firmly establish the rule that the f. o. b. clause may be used solely with reference to the price. The finding of the court that the term '\$1.43 $\frac{1}{3}$ per 100 lbs. f. o. b. Kosmos steamer, Seattle', in one contract, and the like clause in the other, as between plaintiffs and defendants, must be held to refer to the price and not to the place of delivery, seems to us to be fully supported by the testimony."

Counsel for defendant quote us as having said that where the delivery is f. o. b. a vessel, some vessel must be tendered. We believe that to be the broad rule. But furthermore, in a sale f. o. b. vessel, *the vessel is not material* if the stipulation f. o. b. vessel is primarily a price term. That was the case in *Meyer v. Sullivan*, and that is this case. "F" in "f. a. s." means *free*—that is, without further charge; it means that included

in the price of the lumber is the cost of placing it on the dock; it is there *free* along side.

And so, in *Meyer v. Sullivan*, the court found that in the phrase "f. o. b. Kosmos liner", the reference to the liner was primarily to indicate at what point the wheat should be free to the buyer. The mention of the liner was part of the price terms rather than an insertion of a condition precedent to delivery.

So here the documents in their origin show that the phrase "f. a. s. mill" was a price term. If the court will turn to the original sale memorandum of October 17, 1916 (Plffs. Exh. 2, Record), it will find in it "Price \$10.00 per thousand base 'G' list less $2\frac{1}{2}$ and $2\frac{1}{2}$ f. a. s. mill". And to the final order under "notes", which says:

"This price is for delivery *f. o. b. mill wharf* Knappton within reach of vessel's tackles and/or on barges *a. s. t. mill wharf* Knappton, Wash." (Plffs. Exh. 4; also complaint, Record p. 6);

so that these phrases "f. o. b. mill wharf" and "on barges a. s. t." were *price* terms, not covenants constituting conditions precedent to delivery (Record p. 89, pp. 142-144).

We submit the instant case is indistinguishable from *Meyer v. Sullivan*.

Delivery on the wharf or on barges would have constituted full performance by the defendant of defendant's obligations under the contract (Record p. 89). The fact that the parties *contemplated* that the lumber would be loaded on the "Marston" did not make the "Marston" a necessary factor in the performance of the con-

tract, or her presence a condition precedent to defendant's obligation to deliver the lumber to the plaintiffs on the wharf or on barges.

The provision "within reach of vessel's tackles" did not affect the seller's obligation to deliver on the mill wharf, or on barges at mill wharf. If the lumber had been placed on the mill wharf or on barges at the mill wharf the delivery would have been complete. Suppose the "Marston" had been actually at the mill wharf, and delivery had been made on the mill wharf, and instead of loading the lumber onto the "Marston" the plaintiffs chose to load it onto barges, or chose to put it into rafts. Could the defendant have complained? Clearly not.

In *Norrington v. Wright*, 115 U. S. 188, 203, it is pointed out that

"A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract."

Tested by this statement, the naming of the "Marston" described neither the subject-matter, i. e., the lumber, nor the time nor the place of shipment, all of which are fixed by other express stipulations in the contract.

It is because of the principle announced in *Norrington v. Wright* that the designation of a vessel as the ship by which a cargo is to arrive has been frequently held

to control performance of the contract. Where a cargo is sold to arrive by a certain vessel, both the time of the performance and the identity of the subject-matter are governed by the shipment by the designated vessel. In such cases the naming of the vessel is a material condition of the contract, upon which the aggrieved party, in case of failure, may stand.

In this case the naming of the "Marston" falls clearly in the class of cases which provide that a provision in a contract may be waived by the party for whose benefit it is inserted.

"It is a well-settled maxim that a party may waive the benefit of any condition or provision made in his behalf, no matter in what manner it may have been made or secured."

Broom's Legal Maxims, p. 547;

Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 63;

Collins v. Ramish (Cal.), 188 Pac. 550, 551.

The question of what is a condition precedent, and what is a stipulation, is discussed in *Behn v. Burness*, 32 L. J. Q. B. 204; 122 Eng. Rep., Reprint, p. 281. In that case the statement in the charter party that the ship "is now in the port of Amsterdam" was held to be a condition which became an integral part of the contract, and not merely a representation, and that consequently the contract was broken, the representation having proven to be untrue. The court said:

"A question, however, may arise, whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of con-

struction which the court, and not the jury, must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. * * * With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or nonperformance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favor."

An instructive case is *Neill v. Whitworth*, L. R. 1 C. P. 684, 144 Eng. Rep., Reprint, p. 513. In that case the question was on a bought-note, reading as follows:

"Bought for account of Messrs. Neill Brothers, of B. Whitworth & Brothers, Manchester, 500 bales of cotton, at 15-1/8 d. per lb., guaranteed October shipment, to arrive in Liverpool per ship or ships from Calcutta.

The cotton guaranteed fair Bengal. Any slight variation in mark not to vitiate this contract. In case of dispute arising out of this contract, the matter to be referred to two respectable brokers, who shall decide as to quality, and the allowance, if any, to be made.

The cotton to be taken from the quay; customary allowance of tare and draft; and the invoice to be dated from date of delivery of last bale.

To be in merchantable condition; the damaged, if any, to be rejected, provided it cannot be made merchantable. Should the cotton be transshipped into other vessels arriving, the contract to hold good; but, if any of the vessels be lost, the contract to be void, so far as regards such ships only.

Payment, cash within ten days, made equal to ten days and three months. Cash on account, before delivery, if required.

Trueman & Rouse."

The cargo, having arrived, was landed on the quay at Liverpool and subsequently warehoused. Delivery orders were not given to the plaintiffs until after the cotton had been carried to the warehouse. Subsequently the vendors offered to deliver the whole 500 bales from the warehouse at quay weights, or to cart them back to the quay and deliver them there. Plaintiffs refused to take the cotton, insisting that the defendants had broken their contract by allowing the cotton to be warehoused instead of delivering it on arrival from the quay. Counsel for the defendants took the position that the provision that the buyers were to take the cotton from the quay did not amount to a condition binding the sellers to deliver on the quay, but merely to a stipulation for their advantage, that, if they chose so to deliver, the vendees should be there ready to receive it,

"the object being that the vendors shall not be at the charge of warehouse rent, risk of fire, and the like. The distinction between stipulations which are conditions precedent and those which may be compensated for by damages in a cross-action is

very elaborately discussed by Williams, J., in a judgment delivered by him in the Exchequer Chamber in a case of *Behn v. Burness*, 32 Law J., Q. B. 204, the result of which shows that this was a mere stipulation introduced for the benefit of the sellers. Whether particular terms of delivery amount to a condition precedent or not, depends, according to the judgment of Lord Ellenborough in *Ritchie v. Atkinson*, 10 East 295, 306, 'not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract'."

The court, by Erle, C. J., Williams, J., Willes, J., and Keating, J., sustained this opinion. Erle, C. J., said that the question was whether the contract between the parties contained a condition precedent, to be performed by the vendors before they could call upon the vendees to accept the cotton, and the court said:

"The words relied on as constituting a condition precedent are, 'The cotton to be taken from the quay.' It was in fact landed and warehoused; and the plaintiffs, finding that it had been taken to the warehouse, refused to receive it, although the defendants offered to deliver it to them at quay weights, and even to cart it back to the quay free of expense. The law upon the subject of what does and what does not amount to a condition precedent, or only to an independent stipulation, is laid down with much clearness by my Brother Williams in a very elaborate judgment delivered by him in the Exchequer Chamber in the recent case of *Behn v. Burness*, 4 Best & Smith 296. *The distinctions there pointed out are well worthy of attention. Looking at the contract now before us with the light afforded by that case, I am of opinion that the clause in question constitutes an independent stipulation introduced solely for the benefit of the vendors, and therefore is matter on which the ven-*

dees cannot rely as amounting to a condition precedent. See the nature of the contract. It is a contract by bought and sold notes for 500 bales of cotton to arrive, at a certain price and of a certain quality. Then comes a stipulation that, 'in case of dispute arising out of this contract, the matter shall be referred to two respectable brokers, who shall decide as to quality, and the allowance, if any, to be made'. Then come the words in question,—'The cotton to be taken from the quay.' This comes after the more operative words, and among some provisions which are inserted in favor of the vendors. Looking at the nature of the stipulation itself, *I cannot see how it can be of any importance to the vendees whether they receive the cotton from the quay or from the warehouse, provided the warehousing does not impose on them any additional expense or undue delay. It seems to me to be perfectly clear that it was a stipulation inserted for the benefit of the vendors, to enable them to call upon the vendees to take the cotton from the quay, in order to save them expense.* I am also clearly of opinion that it was not intended to operate as a stipulation for time. There is nothing to show that the whole number of bales stipulated for were to be delivered out of the ship the moment she arrived; they might be the first 250 unloaded, or the last. I see nothing, therefore, in the stipulation which points to the time of delivery, or shows that it was for the benefit of the vendees; and I do see very good reason why the vendors should make it. I am therefore of opinion that it was not a condition precedent, that there has been no breach of the contract on the part of the vendors, and consequently that this action will not lie."

Willes, J., in concurring, came to the same conclusion on the following grounds, saying there were several reasons for holding that the clause could not be considered as a condition precedent:

“The stipulation does not affect the identity of the cotton, or its quantity, or its quality,—as, for instance, that it should be cotton from Mobile or from New Orleans, or the like. Then, does it amount to a stipulation as to time. Without it, the contract would stand as a contract for the delivery of the cotton within a reasonable time. The words were evidently introduced with reference amongst other things to who was to be at the charge of the warehouse-rent, insurance, etc. These would otherwise have been at large. There was, therefore, a manifest use for the words ‘the cotton to be taken from the quay’. The meaning of them is that the quay is to be taken as the place at which the delivery is to be made. This construction is fortified by the provision made for the usual allowance, and the stipulation that the invoice is to date from the delivery of the last bale. That must mean from the time the last bale is landed on the quay. The contract, therefore, stands as a contract for the delivery of the cotton in a reasonable time and under reasonable circumstances, the cotton to be at the buyers’ charge from the time it is landed on the quay. That seems to me to be the proper construction; and it is the construction which the sellers have put upon it.”

It is obvious that in this case the lifting of the lumber from the place of delivery on board the “Marston” is no part of the consideration moving to the vendors, and according to the tests applied by Willes, J., in *Neill v. Whitworth*, affects neither the time, place, quantity nor quality of the article to be delivered.

A very important case here is *Thornton v. Simpson*, 2 Marsh. 267; 128 Eng. Rep. p. 1151. There there was a contract to sell fifty tons of hemp at a price per ton, to be shipped from St. Petersburg or Cronstadt, in June or July, and *the ship’s* name declared as soon as

known; in case *the ship* did not arrive before December 31st, the contract to be void. The seller in that case, believing that the fifty tons of hemp contracted for had been shipped at St. Petersburg on board the "Lively", so advised the defendants. The "Lively", however, only took twenty tons of the fifty tons in question, and twenty-four tons for others. Thereupon, some months later, the sellers advised the defendants that they reserved the option of making up the deficiency on the "Unity" or the "Paragon", both from St. Petersburg. The defendants refused to accept hemp from the latter vessels, and insisted on fifty tons from the "Lively". Plaintiffs then sold thirty tons, which they had brought by other vessels, at a loss and sued the vendees for their damages. The report of the case discloses the questions involved:

"Gibbs, C. J. Three objections are taken to the plaintiffs' right to recover: 1st, that the plaintiffs were not at liberty to send the hemp by more ships than one; 2ndly, that after having given notice of the ship that was bringing the goods, the plaintiffs were bound by their election, and could not give notice of another ship; 3rdly, that the plaintiffs violated their contract in not giving the defendants all that came by the 'Lively'. All these objections stand on different grounds. As to the 1st question, whether if the plaintiffs had in the first instance given notice that half the hemp was coming by the 'Lively', and half by the 'Paragon', the defendants could have refused to accept it, I think they could not. The material thing is the time of delivery; it was at all events to be before the 31st of December, but by what *ships* the hemp was to come was immaterial. As to the second question, we must look at the terms of the contract. 'The name of the ship', which I have assumed as equivalent to *ships*, 'to be

declared as soon as known'. *In September, four months before the delivery must necessarily be completed, the plaintiffs thought they knew by what ship the hemp was coming, and gave notice, but they were deceived. The question is, then, whether the defendants are not bound by the second nomination and I think they were. They were not prejudiced, they had taken no steps upon the first notice. As to the third question, I think, whatever part of the 50 tons purchased for the defendants, the plaintiffs received by the 'Lively', they were bound to deliver to the defendants; but whatever part of the 50 tons they did not receive by the 'Lively', they were at liberty to make up out of the 'Unity' and 'Paragon'. It is true the plaintiffs had other hemp by the 'Lively', besides the 20 tons, but they had ascribed that other hemp to other purchasers, and the defendants had no right to say that hemp ought to be delivered to them. I therefore think the rule ought to be discharged.*

Dalles, J. In this case there are three questions. As to the 1st, if the words be doubtful, we must look to the substance of the contract, and I think that has been complied with. *It is said, that instead of sending the hemp by ship or ships, the plaintiffs are bound to one ship only.* At first they were at liberty to send by any ship, the contract not saying that the goods shall come by the first ship, nor naming any ship; therefore the substance of the contract is, that it need not come by any particular ship. As to the 2nd point, I think the plaintiffs were at liberty to give the second notice. As to the 3d, the plaintiffs having contracted to sell the other parts of the cargo of the 'Lively' to other persons, did all they were bound to do, in delivering the 20 tons to the plaintiffs.

Park, J., was of the same opinion. The plaintiffs were at liberty to send the hemp by any ships, so that it arrived before 31st December. As to the 3d point, the case must be considered as if there were

only 20 tons on board this ship, and the contract has been substantially complied with.

Burrough, J., concurring, the rule was discharged."

In *Reade v. Meniaeff*, 7 C. B. 159; 137 Eng. Rep. Reprint, p. 57, there were two contracts, by which the defendants engaged to ship at Cronstadt, for the plaintiffs, 250 tons and 350 tons, respectively, of rye meal. Each contract stipulated that the shipments should be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel, and getting the goods down to Cronstadt; that payment should be made one-third at three months from the date of bill of lading, but that, should the vessel not arrive in time for the goods to be shipped before the 30th of June, or the sellers not be able to procure a ship by that date, the sellers should draw for the remainder as specified above. The buyers sent out three vessels, no one of which was of sufficient capacity to take on board the quantity mentioned in either contract, and which arrived at the port of loading at different times. *The sellers claimed that this was a breach of condition precedent, and that the buyers, by the terms of the contract, were obligated to send a single ship for each cargo.* It was held that the buyers could maintain their action, although they did not send out one vessel. The opinions by the court were by Maule, J., Cresswell, J., V. Williams, J., and Wilde, C. J. The court said:

"The question upon both pleas turns mainly upon the meaning of the contract,—whether the plaintiffs could perform all that they were bound to do by way of condition precedent, without sending out

one vessel to receive the quantity of meal mentioned in each contract. The contracts were to this effect: 'Sold for P. Meniaeff & Son, 250 tons (20 tons more or less to be no object) of Russian kiln-dried rye meal, in mat bags, sweet and in good condition when shipped, at £8 7s. 6d. per ton, free on board at Cronstadt. *Shipment to be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel, and getting the goods down to Cronstadt.* The sellers, if required by the buyers, to take ship-room at St. Petersburg, at the current rate of freight, for account of the buyers; to be paid for by the buyers' acceptance of the sellers', or agents', drafts, one-third of the above sale at three months from the date of the contract, and the remainder by their acceptance at three months from the date of the bill of lading, on handing the same. But, should the vessel not arrive in time for the meal to be shipped by the 30th of June then next, or the sellers not be able to provide *a ship* by that date, then the sellers should be at liberty to draw for the remainder, as specified above', etc. The contract for the 350 tons was in similar terms.

Now, these are mercantile contracts between two dealers, for the shipment of goods from a foreign port. The substance of the contracts is, I think, this,—that 250 and 350 tons of meal, respectively, were to be shipped at Cronstadt, for Reade & Co. The defendants were to put it on board at Cronstadt; and, further, if required, were to take up ship-room at St. Petersburg, at the current rate of freight. *That is a stipulation for the benefit of the buyers.* The buyers were to pay for the meal, one-third by acceptance at three months from the date of the contract (which has been done), and the residue by acceptance at three months from the date of the bill of lading, on handing the same. There is no stipulation here, on the part of the buyers, that they will send a ship, or anything of the kind. But for an expression I will presently advert to, the effect

would be, that the buyers might point out any reasonable mode of shipping the goods they pleased,—whether in one ship or in more. That would have been beyond doubt, if, in speaking of the mode of payment, the contract had not said that the residue was to be paid for by acceptance at three months from the date of the bill of lading,—and, further, that, should the vessel not arrive in time for the meal to be shipped by the 30th of June then next, or the sellers not be able to provide a ship by that date, then the sellers should be at liberty to draw for the remainder as specified above. That is, if the buyers do not send a ship in time, or the sellers cannot engage ship-room at St. Petersburg, the latter were to draw for the balance, although the meal should not have been shipped. *There is no agreement, in terms, that the plaintiffs shall send out a vessel. The use of the words ‘the vessel’ and ‘the bill of lading’, may be considered reasonably to show the parties contemplated that the plaintiff would send out one ship only to receive the quantity mentioned in each contract. That being the probable state of things they contemplated (but did not stipulate for), they in terms provide for that mode of performance. It seems to me, however, that we should be giving an undue degree of narrowness to the construction of a contract of this sort, if we were to hold the buyers bound to adopt that mode of performance as a condition precedent to the right to maintain an action against the sellers for a breach of the contract on their part. * * ** If the construction I suggest be the true one,—and I have no doubt it is,—the circumstance of a single ship not having been sent to receive *the meal which was the subject-matter of each contract*, does not show that there has been a failure of performance of anything that ought to have been performed by the plaintiffs; there is, therefore, no inconsistency in saying that the plaintiffs have performed the contract in all things on their part, although they sent three ships, no one of which was of capacity sufficient to take

on board the entire subject-matter of each contract. I therefore think that the verdict on these two issues was properly entered for the plaintiffs."

Cresswell, J., said:

"As to the second action,—*there was no express bargain between the parties that one ship, and one ship only, should be sent to Cronstadt, to receive the quantity of meal comprised in each contract. The whole argument arises from the use of the words 'ship' and 'bill of lading', in the singular number. We may infer that, at the time of entering into the contracts, the parties contemplated that one ship only should receive each lot; but not that the plaintiffs contracted, as a condition precedent, that this should be done. I think there was abundant evidence that the plaintiffs were ready and willing to perform the contracts in all that they were bound to perform.*"

In *Bourne v. Seymour*, 16 C. B. 349; 139 Eng. Rep., Reprint, p. 788, a contract for "about 500 tons of nitrate of soda", contained the further provision that "*it is understood that the above nitrate of soda is to form the full and complete cargo of the 'John Phillips',*" and also the further provision that if the "John Phillips" should go ashore, or be unable to prosecute her voyage, the buyer agrees to take another cargo or cargoes of about equal quantity. It was held that this was a contract for five hundred tons, more or less, and not of a quantity limited by the capacity of the vessel. Also that it was not a warranty that the "John Phillips" should be of a capacity to carry five hundred tons.

Jervis, C. J., said he thought *the true construction of the contract to be that the plaintiff was to have five*

hundred tons, and that the quantity was not limited by the capacity of the "John Phillips". The "John Phillips" completed the voyage, but carried considerably less than five hundred tons, not having capacity for that quantity. Jervis, C. J., said:

"The parties evidently contemplated that that vessel was capable of carrying 'about five hundred tons'."

But as it turned out she could not carry five hundred tons, he was of the opinion that the buyers were entitled to judgment for the difference. This was also the opinion of Maule, J. He said:

"In truth, it is just the same as if all about the 'John Phillips' were struck out of the contract. It is not said what shall happen if the 'John Phillips' should be incapable of carrying the whole quantity stipulated for."

It was his opinion that the sellers should be excused from performance by the "John Phillips" if the "John Phillips" could not carry the entire cargo. In his opinion the "John Phillips" was mentioned because both parties believed the "John Phillips" capable of carrying about five hundred tons of the commodity in question. He held that it was "an absolute contract for the delivery of a certain quantity of merchandise which the defendant might have delivered, and for the non-delivery of which he has no excuse".

Cresswell, J., was of the opinion that:

"The contract is for the sale of 'about 500 tons of nitrate of soda'; and *we may infer that the intention of the parties was that the 'John Phillips' should be employed to bring it home, and that the*

buyer should have the full benefit of that ship for that purpose. *There was, however, no warranty that the whole should come by the 'John Phillips'.* It was agreed that the 'John Phillips' should be fully laden with it; but there is no absolute engagement that she should be able to carry or should carry the whole 500 tons."

Crowder, J., was of the same opinion, and noted the contention that the word "about" was inserted with reference to the subsequent stipulation that "the above nitrate of soda" was to form the full and complete cargo of the "John Phillips". He was of opinion, however, that the word "about" was equivalent to "more or less", and he said:

"Though the parties seem evidently to have contemplated that the 'John Phillips' would be able to bring home the whole quantity stipulated for, there is no actual engagement on the one side to buy and on the other to sell only so much as she would contain."

In *Springfield Seed Co. v. Walt*, 67 S. W. 938, the court said:

"The mutuality of covenants turns on the intimacy of their connection considered in the light of the entire agreement,—whether one was so bound up with the other that the failure of one party to perform a stipulation hindered performance by the other party, or left him without an adequate consideration for performance. A wholesome, rule, and the most practical one for determining whether covenants are mutual or independent, was once well stated by Lord Ellenborough as follows: 'When the mutual covenants go to the whole of the consideration, they are mutual conditions, the one precedent to the other; but when the covenants go only to a part, then a remedy lies on the covenant to

recover damages for the breach of it, but it is not a condition precedent.' *Ritchie v. Atkinson*, 10 East 306; *Leake, Cont.*, 650."

In the case of *Ellsworth v. Knowles*, 8 Cal. App. 630, 633, a contract for the purchase of apricots contained the clause, "Buyer to furnish lace paper with usual allowance for same." The defendant failed to deliver the apricots, and set up as one ground of defense that the plaintiff, the buyer, had failed to furnish lace paper. It was shown that the provision in question was a provision inuring to the benefit of the buyer, and the court said:

"Appellants also urge that plaintiff never supplied the lace paper, and that this was an act that he was required to do before defendants could pack or deliver the apricots. But it was clearly shown that the provision 'Buyer to furnish lace paper with usual allowance for same' was a provision for his benefit. One of the defendants so testified. While defendants were still trying to obtain the apricots to fill the contract, and before they finally abandoned their efforts to carry out the contract, plaintiff notified them that they could use their own lace paper. He thus waived a provision of the contract intended for his benefit. A party to a contract may waive a provision intended for his benefit."

In *Diepenbrock v. Luiz*, 159 Cal. 716, a lease contained the provision that the lessor might sell the demised premises at any time during the said term, and that whenever sold "this lease shall cease and be at an end". The premises having been sold, the lessee contended that the lease was terminated the instant a bona fide sale was effected by the lessor. Judge Shaw (page 722) said:

“The provision for the termination of the lease upon a sale of the premises was solely for the benefit of the lessor. He could undoubtedly waive the benefit thereof and, without terminating the lease, he could sell and convey the premises subject to the lease.”

It is pointed out in *Redpath v. Evening Express Co.*, 4 Cal. App. 361, 367, that it is not the breach of any term of a contract that entitles the other party to refuse performance. It is only where the obligation broken by the plaintiff is a condition precedent to the defendant's obligation that the breach is a defense. It was said in the case last cited that the failure to perform an obligation where “it is only partial and either entirely immaterial or capable of being fully compensated,” has always been regarded as insufficient to constitute a defense (page 368).

An obligation in a contract is not regarded as a condition precedent unless made so by the express terms of the contract, or by necessary implication.

1 Chitty's Pleading, 321, 322;

Anson on Contracts, 287, 303, et seq., 308, et seq., 376, et seq.

Conditions precedent are not favored in the law, and stipulations in a contract will not be construed to be conditions precedent unless clearly required by the terms of the contract.

Antonelle v. Lumber Co., 140 Cal. 309, 315.

It is clear therefore that it is not every stipulation in a contract the breach of which excuses the other party from performance. The presence of the “Marston” at

the mill wharf, where delivery was to be made, added nothing to the ascertainment of either the time or place of delivery, or the quantity or quality of the lumber to be delivered. Since the delivery was free on board mill wharf, or free on board barges, the further disposition of the lumber in no way entered into the seller's obligations under the contract. The acts to be performed by the seller were precisely the same whether the lumber was loaded onto the "Marston" or not. Its obligation to perform could not, therefore, be affected by the presence of the "Marston" at the wharf. The provisions for demurrage and for a certificate were obviously provisions for the benefit of the buyer, which the buyer could waive. They were certainly no part of the consideration moving to the seller.

We submit that the case here falls within the reasoning of the Justices in *Reade v. Meniaeff*, *supra*. To paraphrase the language of that decision, the loading of the "Marston," "being the probable state of things they (plaintiffs) contemplated (but did not stipulate for), they in terms provided for (but are not bound to) that mode of performance." We quote the language of Cresswell, J., in that case:

"We may infer, that, at the time of entering into the contracts, the parties *contemplated* that one ship (and here we may say the 'Marston') should receive each lot; *but not that the plaintiffs contracted, as a condition precedent, that this should be done.*"

There is nothing in the contracts in this case which can be said to bind the plaintiffs to the use of the "Marston" in taking delivery of the lumber. That they

expected to use her for that purpose is obvious, but there is no provision which makes her use a condition precedent to delivery.

In *Harrison v. Fortlage*, 161 U. S. 57, the contract was for a shipment from the Philippines per steamer "Empress of India," at five and five-eighths cents per pound ex ship. The cargo was loaded on the "Empress of India", but was subsequently transshipped. It was claimed that shipment and delivery would have to be made by the "Empress of India." The Supreme Court of the United States held otherwise, and came to the conclusion that the contract did not require that the sugar should arrive by the "Empress of India," differentiating the case in this respect from those cases where the contract was for the sale of goods to "arrive by" or "on the arrival" of a named ship. The court said:

"A particular ship being designated as to the putting on board only, and not as to the arrival, it is not to be inferred that the goods must be carried to their destination in the same ship."

To the contention that the provision for five and five-eighths cents per pound ex ship required a delivery from the "Empress of India," the court replied:

"The words 'ex ship' are not restricted to any particular ship; and by the usage of merchants, as shown in this case, simply denote that the property in the goods shall pass to the buyer upon their leaving the ship's tackle, and that he shall be liable for all subsequent charges of landing. They do not constitute a condition of the contract, but are inserted for the benefit of the seller. See *Neill v. Whitworth*, 18 C. B. (N. S.) 435, and L. R. 1 C. P. 684."

It is, therefore, respectfully submitted that the mention of the "Marston" in the contract was a stipulation at best for the benefit of the buyer, which the buyer could waive; that it was not a stipulation affecting the performance of the contract by the seller or the consideration moving to the seller, nor a stipulation which tended to fix either the time or place of delivery, or the quality or quantity of the lumber to be delivered; that, therefore, it was not a condition precedent, upon the failure of which the seller could refuse to perform the contract. If that be so, the failure of plaintiffs to allege or prove that the "Marston" was alongside the wharf upon which delivery was to be made, or alongside barges upon which delivery was to be made, is immaterial to plaintiffs' cause of action.

ARGUMENT OF PLAINTIFF IN ERROR

The nine contentions of the plaintiff in error all revolve about the same question, to wit: Was it essential to plaintiffs' right to the delivery of the lumber in question that at the time of delivery the schooner "Marston" should be alongside the wharf or the barges on which defendant was required to place the lumber?

I.

THE FIRST CONTENTION OF PLAINTIFF IN ERROR

(Brief pp. 9-24).

The argument of plaintiff in error under this contention seems to be threefold, it being its position (a)

that Judge Van Fleet erred in overruling the demurrer to the complaint; (b) that Judge Bean erred in following this ruling because Judge Van Fleet had later reversed himself in overruling the demurrer to the answer, and (c) that there was error of some kind in connection with the consideration of the contract between plaintiffs and The Charles Nelson Company.

(a) The first of these positions, relating to the sufficiency of the complaint, has been fully considered above. Plaintiffs in error now cite no authorities in support of their suggestion that the demurrer to the complaint should have been sustained.

(b) The argument, based upon the fact that Judge Van Fleet overruled a demurrer to the answer, is supported by no authorities or discussion of the law, but is based simply on the theory that Judge Bean was bound to follow the latest ruling of Judge Van Fleet, irrespective of the legal soundness of his rulings. Obviously such an argument is entitled to no consideration in this court, where the issue is simply whether or not the judgment of Judge Bean is right or wrong. Even if Judge Van Fleet's ruling on the demurrer to the answer was inconsistent with Judge Bean's judgment, if Judge Bean's judgment is right it must be affirmed.

But the decision of Judge Van Fleet on the demurrer to the answer is in no way inconsistent either with his original ruling on the demurrer to the complaint or with the judgment given by Judge Bean. While the plaintiff's demurrer to nine pages of the answer was sustained, the first eleven pages stated matter which would

constitute matter of defense, if defendant could prove it. We refer to the matter of trade terms as pleaded by defendant and to customs set up by defendant. This is why the demurrer to the answer was overruled. The evidence as to the meaning of the trade terms did not support defendant's contentions and the alleged customs were abandoned by defendant as an aid to their defense. Indeed the eleventh finding of the trial court is that there was no material or competent evidence offered or given on the trial showing any custom which is sufficient to vary in any way the written agreement or contract between the parties as alleged in the pleadings (Record p. 57). Thus the matter which Judge Van Fleet, in overruling the demurrer to the answer, held might be shown in answer to the complaint, failed as a defense and the ruling that it might be proven has no further significance.

(c) The present position of plaintiff in error in regard to the Charles Nelson contract is by no means clear. The brief does not comply with subdivision b, of Sec. 2, of Rule 24 of this court, requiring "a specification of the errors relied upon which in cases brought up by writ of error shall set out *separately and particularly* each error asserted and intended to be urged.

* * * When the error alleged is to the admission or to the rejection of evidence the specification shall quote the full substance of the evidence admitted or rejected." The only exceptions saved by plaintiff in error in this connection (Record pp. 69-70) relate to certain preliminary oral testimony given by Mr. Comyn. These exceptions are made the basis of assignment of

error No. XI (Record p. 323). This assignment of error is not mentioned in the brief in any way and has apparently been abandoned. In respect to the admission of the instruments themselves, there is no assignment of error.

We submit, however, that it could not have been error for the court to permit testimony as to the meaning of the phrase "sold prior to October 11, 1916," in the instrument dated November 2, 1916 (Brief of plaintiff in error, pp. 17 to 23). As the court correctly said it was "entitled to all the facts surrounding the case, if I have to interpret this contract" (Record p. 71), and as the court noted, the memorandum of November 2, 1916, says, "This will confirm sale to you of four cargoes" (Record p. 73). The defendant took over the contract of October 11, 1916 (Record pp. 74 to 75) and the whole matter constitutes one transaction.

Mr. Baxter, the manager of the defendant, had drawn the contract, which was made "prior to October 11, 1916" (Record p. 221). He had been the manager of The Charles Nelson Company.

"They were owners of two large mills, and these two large mills, it was known, were going into this combine, and I was slated to be manager of the combine," referring to the defendant. (Record p. 221.)

"Mr. Comyn came to me about these four cargoes. I told him we would take care of them. He said he had committed himself, or had sold them at a \$10 base." (Record ib.)

Later the witness testified that he

"told Mr. Comyn that we had taken all the others on at \$9.50, and I did not think it would be fair to

take his at \$10, and for that reason we canceled that entirely and substituted the new contract at \$9.50. * * * Really the Douglas Fir Company took over the obligation of The Charles Nelson Company with respect to those four cargoes, and put them in at a price of \$9.50 instead of \$10, half a dollar lower than the original price at which the contract was made, so as to put Mr. Comyn on the same basis with all the others." (Record p. 222.)

Moreover and quite apart from these matters, without reference to the previous correspondence, we submit that the interpretation of the instruments dated November 2, 1916, and December 15, 1916, remains the same (*supra*).

II.

PLAINTIFF IN ERROR'S SECOND CONTENTION

(Brief pp. 24-32).

We pass the argument (Brief of plaintiff in error pp. 24-32) concerning the Federal Trade Commission and defendant's relations to it, as forming no material factor in this contract. There was no evidence on the subject. Neither can we understand how or why defendant's relations with the Federal Trade Commission or the purposes of its charter or the legality or illegality of its practices could bind the plaintiffs.

The various matters specified at pages 27 to 29 of plaintiff in error's brief as being excluded from consideration under the trial court's decision will be found on analysis to have no bearing on the issue. F. a. s. mill wharf means "free alongside wharf" (Record

pp. 117, 137, etc.). As the testimony shows the price covered delivery on the mill wharf; the buyer had to take the lumber off the wharf. Inspection certificate and tally would be the same whether the delivery would be to barges or on the wharf and whether a sailing vessel or a steamer were alongside or not. (Record pp. 88, 89, 90, 92.) As a matter of fact inspection and tally under the contract would be made on the mill wharf and would be the same, unaffected by the presence or absence there of a carrier vessel. (Record pp. 77, 106-7.)

Plaintiff in error (Brief p 30) cites:

National Pub. Co. v. International Paper Co.,
269 Fed. 903, 905.

We submit the case is not in point. There there was a contract by which defendant agreed to furnish plaintiff with "the entire supply of half-tone newspaper required to print rotogravure supplements * * * during the period of one year, * * * estimated at 400 tons, to be ordered and delivered in installments of approximately tons per month." Plaintiff was, at the time the contract was made, engaged in the business of printing newspaper supplements, and, although not then using rotogravure, was intending to install a rotogravure press, as it did soon after.

Judge Hough held this to be a "requirement contract", under which plaintiff was not entitled to demand, nor defendant obligated to supply, 400 tons, without regard to plaintiff's requirements during the year for rotogravure work. * * *

There was a dissent by Judge Ward, who construed the contract to be for 400 tons.

The case is obviously not parallel to this case, which fixes a quantity variable within a specified limit of 15% to suit the buyer's convenience.

The only other matter discussed in this portion of plaintiff in error's brief requiring notice is the argument that because plaintiffs requested and were refused the privilege of substituting other vessels than those named that therefore they had no such right (Brief of plaintiff in error, p. 26; see also p. 48). But if the naming of the vessels in Mr. Baxter's sale note of November 2, 1916, did not constitute a material covenant, and make the presence of the vessels a condition precedent to performance, the correspondence requesting the right, and the refusal of the right to substitute, could not make it material, or such a condition. Nothing indicates that the parties intended to modify the contract by this correspondence, or that they did so; as an interpretation of the contract, the letters cannot fix the parties' rights. That is a matter for the court. The assumption that the defendant would not object, did not mean that plaintiffs had not the plain right referred to even if defendant did object. Had defendant wished to commit plaintiffs to the position now taken, defendant should have asked plaintiffs for a confirmation of that position.

Furthermore the court is not called upon to consider plaintiffs' right to substitute another vessel, but merely

plaintiffs' right to delivery on the mill wharf or on barges, as called for in the contract, though the "Marston" might not be alongside at the time of delivery.

III.

PLAINTIFF IN ERROR'S THIRD CONTENTION

(Plaintiff in Error's Brief pp. 32-46).

The reference to our previous position in this case at page 32 of brief of plaintiff in error is disingenuous. As already stated, we took the ground, which we still maintain, that a delivery f.o.b. a vessel is different from a delivery on a mill wharf or on barges f.a.s. a vessel. This does not mean that a provision for delivery f.o.b. a vessel may not, under the terms of the contract, be a price term as in this case (see Record p. 89, 142-144), inserted wholly for the benefit of the buyer, and one which he may waive (*Meyer v. Sullivan, supra*, and cases cited). In any event, in this case the contract was not for delivery f.o.b. the "Marston", and it seems unnecessary to further dwell on the attenuated comfort which defendant derives from our discussion of cases involving f.o.b. vessel deliveries at previous stages of this litigation. We proceed rather to a discussion of the authorities which they cite to support their argument.

McCandlish v. Newman, 22 Pa. St. 460, the first case cited by defendant on the subject of f.o.b. and f.a.s. contracts (Brief p. 32) must be considered in the light of the proposition that a provision for delivery at some

point f.a.s. vessel is, so far as the vessel is concerned, a delivery for the benefit of the buyer and not of the seller.

Our contention in this case is that the stipulations in respect to the "Marston" were for the buyers' benefit, and the case of *McCandlish v. Newman* lends point to our argument. It appears in that case that long before the buyer had his vessel ready to receive the lumber to be delivered, the lumber was placed on the wharf where it was destroyed. The court held that while on the wharf and before the buyer had his vessel alongside, the lumber was the property of the seller and at his risk. In other words, the court held that an agreement to deliver on a wharf alongside a vessel entitles the buyer not only to delivery on the wharf, but at a time when he can bring his vessel alongside. The case in no respect challenges our position that if the buyer chooses he may take the lumber off the wharf before the vessel is alongside the wharf, or our argument that the stipulations with reference to the vessel in such cases, are for the buyer's benefit. On the contrary, the case supports that position.

The case of *Wackerbarth v. Masson*, III Campbell 270 (Brief p. 33), relied upon by the defendant, recites a contract as follows:

"London, 17 Jan. 1812.

Mr. Wm. Masson,

Bot of Mr. J. H. Wackerbarth,

95 Hds. Dble. Loaves, at 78/ Free on board a foreign ship—Prompt 2 months—a bill at 2 months with interest."

The defendant demanded of the plaintiff that the sugars be transferred into his name in the warehouse-keeper's books. The plaintiff refused to do so, but offered to put the sugars on board any ship the defendant should name. The defendant still insisted upon an order for delivery of the sugars, and, being unable to procure it, intimated to the plaintiff that he entirely renounced the contract. The report of the case states:

“It appeared that when sugars are sold for exportation in this manner, the seller is entitled to a bounty, which he receives when they are bonded.”

This bounty the seller would have lost by delivery to a warehouse, thus effecting a material change in the contract.

But an essential point of difference in this case, as in *Armitage v. Insole* (Brief of plaintiff in error, p. 35) and in *Dwight v. Eckert* (ib. p. 36) and in *Walton v. Black* (ib. p. 36) is that the undertaking was, in every instance, for delivery *free on board* the buyer's vessel.

The case of *McFarland v. Savannah River Sales Co.*, 247 Fed. 652 (Brief p. 37), is entirely different from the case at bar.

In the *McFarland* case the buyer did not have his barge or vessel ready to remove the lumber, and contended that the seller would nevertheless be obligated to pile the lumber on the wharf, “there to remain until taken away at the convenience of the defendant”, i. e., the buyer. In the case at bar the buyers provided facilities to take delivery and remove the lumber within

the time and at the place fixed in the contract. They offered and were ready to take delivery "on barges" or "f.o.b. mill wharf Knappton". The complaint shows that the seller refused to make delivery in either manner.

The McFarland case is authority for the position that it was the duty of the buyers here to take delivery whether the vessel in which the buyers expected to make the shipment was available or not. In the McFarland case the court points out that the buyer bound himself to take delivery to complete the transaction within a specified time, and says:

"He was bound, therefore, to supply barges and vessels within that time. * * * Failing to get the barges he had chartered, he was bound to go elsewhere and obtain other barges, if available, with which to carry out his part of the contract."

The whole basis of the decision in the McFarland case is contained in the view expressed by the court that the contract necessarily contemplated an implied covenant upon the part of the vendee that when the vendor had placed the lumber at the location at which he had agreed to place it, the vendee would remove it; and that, therefore, the furnishing of some vehicle by the vendee for the removal of the lumber was a condition precedent to performance by the vendor. In the case at bar, if we assume such an implied covenant as a condition precedent to performance by the vendor, the vendee, in the first place, performed this condition precedent by undertaking to furnish the barges within the time required by the contract, and the vendor, in

the second place, relieved the vendee of the covenant in question by notifying the vendee of its refusal to cut or deliver the lumber.

In the McFarland case the buyer claimed the right to remove the lumber from seller's wharf after the time fixed in the contract, because the place of delivery was to be "f.a.s. barge or vessel", and claimed that such delivery could be made whether there was a barge or vessel there or not. But, as the court held, the buyer was under an implied obligation to remove the lumber from the wharf as it was delivered. In the McFarland case the buyer was not ready to do so. In the McFarland case, therefore, the presence of the barges was material to the vendor.

In the case at bar, again, the plaintiffs would have been ready to receive the lumber on barges or remove it from the wharf by barges as and when delivered, but defendant refused to recognize their right to do so, and indeed refused to instruct the mill to cut the lumber (Record p. 109). On the theory of the McFarland case, therefore, the presence or absence of the "Marston", or of any ship, however material it might be to the plaintiffs, was immaterial to the defendant, or to the performance of the contract between the parties, since it would not affect the delivery or removal of the lumber.

In the case of *Maine Spinning Co. v. Sutcliffe & Co.* (Brief of plaintiff in error p. 38), the court decided, first, that under the correspondence and facts accompanying the execution of the agreement in that case,

a contract for "delivery Liverpool" meant delivery on board a vessel at Liverpool; and, second, that as the buyer had failed to provide a vessel, the seller was not obligated to some other method of delivery, such as on rail or in warehouse.

The case is precisely like the other cases cited by defendant, to the effect that where a delivery is stipulated to be made f. o. b. a vessel, and the stipulation is a condition precedent to performance, so that without the presence of the vessel performance cannot be had, the vessel must be furnished. The cases do not militate against our contention in this case, but, on the contrary, emphasize our contention.

The court in *Maine Spinning Co. v. Sutcliffe & Co.* pointed out that a stipulation "for the benefit of one of the parties to the contract may be waived by the party for whose sole benefit it is inserted", but held in that case that "a term of the contract as to *the mode of delivery* is not entirely for the benefit of either party", and cannot be waived by one of the parties.

That is exactly our contention. As we have before urged, the presence or the absence of the "Marston" was wholly immaterial *to the mode of delivery* here contracted for, which was to be either on the mill wharf or on barges. Plaintiffs claim no right to vary the mode of delivery specified by the agreement.

Plaintiff in error also cites the following cases (Brief p. 40):

Nickoll v. Ashton, 2 K. B. (1901) 126.

The material part of the contract is as follows: "Sold this day to Messrs. Nickoll & Knight the following Egyptian cottonseed—namely, a cargo to consist of from 1600 tons to 1900 tons *to be shipped by the steamship Orlando at Alexandria* * * * during the month of January, 1900. * * * The seed to be delivered at destined port to *buyer's craft alongside*. * * * (Signed) Ashton & Co." There was a clause that: "In case of prohibition of export, blockade, or hostilities preventing the shipment the contract or any unfulfilled part thereof is to be cancelled." On the face of the contract the words "*ship or ships*" were *obliterated*, and the words "*per steamship Orlando*" were inserted in writing in their place.

Smith, M. R., stating that the contract clearly called for shipment during the month of January *in the steamship Orlando*, and in no other ship, *held* that the contract must be construed as subject to an implied condition that, if at the time for its performance the Orlando should, without default on the defendants' part, have ceased to exist as a ship fit for the purpose of shipping the cargo, then the contract should be treated as at an end. *Romer, L. J.*, concurred.

Vaughan Williams, L. J., dissented, stating:

"The time of loading is a condition introduced into the contract for the benefit of the buyers. It is a condition which the buyers could waive. * * *"

The case is in line with the authorities which hold that a shipment bought *ex a designated vessel* is a sale of a shipment to arrive *by that vessel*—a principle

which we need not dispute in this argument, but which is not in harmony with many authorities. The sale here was for delivery on the wharf or on barges, not on the "Marston."

Forrestt & Son v. Araymayo, 9 Asp. 134, Eng. Rep. Ann. (1900) 2607:

Plaintiffs agreed to build a launch for defendants, which was to be shipped to South America. The period of completion was to end on January 7th, delay to be charged against plaintiffs at 5 pounds per diem as liquidated damages. *Defendants had agreed to provide a ship to carry the launch.* Defendants, after January 7th, did not offer a ship until April; and plaintiffs did not complete the launch until April. Defendants claimed liquidated damages.

Held: Defendants were under an obligation to provide a ship to take the launch, "and in order to claim the benefit of the clause penalizing delay on the part of the plaintiffs, they had to show their readiness to provide the ship. This they had not done until April. Therefore, since the defendants had not done their part, from the point of view of liquidated damages it did not matter that the plaintiffs had not done theirs." Here the launch was to be delivered to a ship which the buyer agreed to provide. Having failed to provide the place of delivery within the time specified the buyer was held to have forfeited his right to performance.

Whiting v. Gray, 8 So. 726:

The case involved a contract by which lumber was to be delivered on cars alongside of vessel at a specified

wharf, at the rate of not less than 20,000 feet per day, “commencing from the 10th of July, or as soon thereafter as vessel can be ready. * * *” The parties had in mind no particular vessel, but understood that the purchaser would have to charter a vessel.

Held: It being admitted that the plaintiff did not charter or procure a vessel within a *reasonable time* after July 10th, the defendant was entitled to judgment in suit against him for failure to deliver the lumber. The case we submit throws no light on the issue here involved. The buyer there undertook to take delivery within a reasonable time and failed to do so.

Blossom v. Shotter, 13 N. Y. Supp. 523: -

Plaintiff telegraphed defendants in Savannah for price of rosin “f.o.b. my vessel at Savannah.” Defendants telegraphed the price, which plaintiff by telegram accepted. Defendant understood the contract was for immediate delivery, but by subsequent correspondence the contract was changed to provide for delivery to the vessel to arrive “within the next 30 or 40 days.” Plaintiff did not furnish vessel until after expiration of forty days.

Held: “It was clearly the intention of the parties * * * that the vessel should be there within the period named, and that was one of the conditions of the contract. And the defendants owed no obligation to the plaintiff except to wait for the expiration of the time, and, after the time expired in which the plaintiff agreed to have his vessel there, they were absolved from completion of the contract.”

This case simply decided that *after* the time of delivery had expired the plaintiff could not demand performance. If we had demanded delivery of the lumber after December 31, 1917, the case might have a bearing here. As it is we submit it has none.

None of these cases we submit decide that the buyer is not entitled to delivery at the *place* specified in the contract within the *time* specified. In each of them the buyer's default would have changed the seller's obligation to deliver if performance had been enforced.

IV.

PLAINTIFF IN ERROR'S FOURTH CONTENTION

(Brief pp. 46-70).

HEREIN ALSO THE SEVENTH CONTENTION

(pp. 81-84).

Defendant makes the point that this was a cargo sale and not a sale of 3,750,000 feet, as expressed in the contract of November 2, 1916. It would be interesting to know just what a cargo sale of two "vessels to be named later" might be (see contract, Plaintiffs' Exhibit 1, Record p. 68; complaint, Record p. 3).

Without reference to the original contract between The Charles Nelson Co. and plaintiffs, which was for "3500M of Oregon ten per cent. more or less" (Plaintiffs' Exhibit 2, Record pp. 24-5), it is quite clear that the contract of November 2, 1916, and the four acknowledgments of order which followed it were for specific quantities, fifteen per cent, more or less to suit capacity of vessel.

Plaintiffs' letter of November 6, 1916, addressed to defendant, reads:

"We have to acknowledge receipt of your sale note covering *3500M 15% more or less October to December, 1917*. We now take pleasure in approving same as per enclosed" (Defendant's Exhibit "F," Record p. 157).

If defendant's contention is correct, there was no purpose in specifying any quantity; the mere specification of the vessel would govern the subject matter of the sale; all the figures in the various contracts would be surplusage; and as to the "two vessels to be named", the contract would be wholly uncertain and indefinite. The fact is as the witness Comyn testified that plaintiffs purchased "one parcel of lumber" (Record p. 149).

Some argument is made on the fact that plaintiffs furnished specifications, pro forma bills of lading, etc., all to be used in loading the lumber onto to the "Marston." From this defendant argues that as late as September 19, 1917, plaintiffs "were still of the belief that the sale was of a cargo for the schooner 'Marston' and nothing else" (Brief p. 50). There is no question that plaintiffs desired this lumber for export purposes. It may be admitted that they wanted to load it on the "Marston." In fact they loaded the "Marston" with the lumber which they bought when defendant failed to deliver. But how does that answer the point that plaintiffs were entitled to the lumber on the mill wharf or on barges if the "Marston" was not yet there?

So the specifications would be the same, whether the lumber was loaded on a barge or on a sailing vessel. As the witness Comyn testified:

“There would not be a bit of difference in the specifications if the lumber was loaded on to a barge or on to a sailing vessel, the specifications would be just the same that you gave the mill to cut” (Record p. 89).

The witness Comyn also testified:

“‘Mill tally and inspection to govern and be final’ means inspection to be made at the mill wharf before the lumber was taken from the wharf. There would be no difference at all in the inspection if the lumber was loaded on to a steamer or if it was loaded on to a sailing vessel. There would be no difference at all in the inspection if the lumber was loaded on to a barge and not on to a sailing vessel.” (Record p. 88.)

“The buyer puts it on the ship, and the seller’s obligation is complete when he puts the lumber on the mill wharf. He must not leave it outside of the mill wharf, he has got to bring it to the face of the wharf so that you can get it and put it anywhere you want to. The buyer is responsible for the taking of the cargo off of the mill wharf. If a steamer is alongside the mill wharf, what I have just stated is absolutely true because you pay the steamer a certain rate which provides that she shall put her tackle over and put that stuff over on board. If you put a steamer alongside, the buyer takes the lumber off the wharf and puts it on the steamer. The seller has nothing to do with that operation. If you put a sailing vessel alongside the wharf, the fact is absolutely the same. With regard to putting the lumber on a sailing vessel, when you charter a ship you pay that ship a certain rate for chartering. The buyer puts the lumber on the sailing vessel. All that

the seller has to do with it is to deliver it on the face of the mill wharf so that the ship can get at it. He does not have to put it on the sailing vessel. If you put barges alongside the wharf, the buyer puts the lumber on the barges. The seller has nothing to do with that. The seller's obligations in respect to the delivery of the lumber are the same whether it be a steamer, a sailing vessel, or a barge, where he buys the stuff 'f.a.s. mill wharf.' " (Record pp. 78-79.)

We suggest that defendant's position that this was a cargo sale is an unsound reply to the proposition that as the contract called for certain quantities to be delivered at certain places, the absence or presence of the vessels could affect neither the obligations nor the rights of the seller. Defendant argues that the vessels were the necessary measure of the quantity to be delivered, and subordinates its argument that their presence was necessary for delivery. Yet when the contract was made two of the vessels were not even known. The fact is that the "Marston's" capacity would measure the quantity deliverable within the limits of fifteen per cent. more or less than 1,300,000 feet; similarly the "Talbot"; similarly the two other vessels "to be named later". The contract fixed the quantity without reference to the ships, but allowed the buyer to vary it by fifteen per cent. to suit their capacity.

The testimony that the exact quantity which a ship will take cannot be determined until the ship is loaded is beside the point. Plaintiffs' letter of September 21, 1917 (Record p. 94) exactly states the fact; the contract was originally "for specific quantities."

What would happen if a vessel tendered exceeded in capacity the quantity named plus fifteen per cent. is well settled by the record.

Thus the two vessels which were originally not named, but later designated under this contract, were the "Bowden" and the "Golden Shore". The "Golden Shore" was first named. When the "Bowden" was named it developed that her capacity, combined with that of the "Golden Shore", exceeded 1450M plus 15%, the quantity specified in the contract. Thereupon defendant notified plaintiffs that the excess was not deliverable under the contract. Defendant wrote plaintiffs:

"San Francisco, August 17, 1917.

Messrs. Comyn, Mackall & Co.,

310 California Street, San Francisco.

'WILLIAM BOWDEN'.

Gentlemen:

We acknowledge your favor of the 16th inst., with specification for this cargo, and accept the vessel conditioned on her making the loading date provided in the contract, and with the further understanding that as the original contract, dated November 2, 1916, provides for two vessels to be named with a joint capacity of 1450M, which is interpreted to mean, as usual, 1450M, 15 per cent more or less, and as you have already named the 'Goldenshore' for one cargo and now name the 'Bowden' for a second cargo, which vessels combined will probably carry more than the maximum amount of the contract, that you will pay us for all such excess carried by these two vessels over and above the 1450M plus 15 per cent, at the present market price, namely, \$20 base 'G' list, less $2\frac{1}{2}\%$ and $2\frac{1}{2}\%$ for cash.

Please send us the charter party, in duplicate, for the 'William Bowden'.

Written in duplicate—please approve and return one copy for our files.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT Co.,
By A. A. BAXTER, General Manager."

AAB-L

"Approved:"

(Plaintiffs' Exhibit 24, Record p. 172.)

This is a conclusive answer to defendant's contention that the contract was for four cargoes for four specific vessels, regardless of the quantities named in the contract, if indeed the contract does not on its face contain the answer.

Neither do the circumstances relative to the loading of the "Marston" in Australia and her return with cargo instead of in ballast change these conclusions. Early in September, 1917, or sooner, it became apparent that the "Marston" could not reach the Pacific Coast by December 31, 1917. The plaintiffs were anxious to load the "Marston". They offered \$2500 for an extension of her loading date (Record p. 293). With or without cargo she could not get to her loading port by December 31st. The defendant refused to extend her loading date. Therefore, plaintiffs, acting no doubt on the advice which defendant infers to have been given (Brief of plaintiff in error, p. 55), permitted her to be loaded instead of coming back in ballast. For this they received a consideration. But as the vessel could not in any event make her loading date, a further delay (Mr. Comyn said there would be none, since she would sail faster with cargo, Record p. 104) could not affect plaintiffs' position. But no significance

can be attached to the offer to defendant of \$2500 for an extension of the loading date, other than the desire of plaintiffs to put the lumber on the "Marston"; they obviously preferred that course to the expense of taking it on barges, with the consequent necessity for storage and double handling.

The witnesses do not support the position that these were cargo sales, and that the figures named had no contractual effect. Defendant quotes Mr. Comyn and Mr. Baxter. Then analysis of Mr. Comyn's testimony does not bear out counsel's view. Mr. Comyn merely testified to what is obviously true, that if a contract is "for a cargo by the vessel" it is a cargo contract. He nowhere said that a quantity contract "fifteen per cent. more or less to suit capacity of vessel" is a contract for the vessel's cargo regardless of quantity.

Mr. Baxter, it is true, so testified. He is impeached by every other witness on the subject, by his own letter and, we submit by the dictates of common sense. According to him the quantities stated could have been "omitted" (Record p. 271), Yet when we come to his letter concerning the "Bowden" (Plaintiffs' Exhibit 24, Record p. 172), he says the contract is for 1450M feet, joint capacity of two unnamed vessels, "which is interpreted to mean as usual 1450M 15% more or less"; he calls attention in this letter to the fact that the two unnamed vessels will exceed in joint capacity 1450M feet, and he demands "that you will pay us for all such excess carried by these two vessels over and above the 1450M plus 15% at the present market price, namely, \$20," etc., etc. (Record p. 173).

In one and the same breath this witness says the figures mean no more than if they had been "omitted", and that any excess above the figures named must be paid for at market price, or double the contract price. The positions are wholly inconsistent.

Finally the contention that in these contracts the quantities named are mere surplusage, and that the buyer, regardless of the stated limits, takes whatever the vessel will carry, is rejected by three of the defendant's own witnesses, Blair (Record p. 245), Griggs (Record p. 194), Ames (Record p. 207), and by our own witnesses, Dollar (Record p. 279), etc., etc.

All the plaintiffs' witnesses and all the defendant's witnesses who testified upon the subject, excepting only Mr. Baxter, testified that the capacity of the vessel forms the quantity sold *only* within the limits of the figures of the contract (Blair, Record p. 246; Dollar, Record p. 283; Dant, Record p. 135; Comyn, Record p. 173; Griggs, Record p. 193; Ames, Record p. 208; Tyson, Record p. 287). To illustrate, Mr. Tyson, on cross-examination, testified:

"Where there was a sale of a specified quantity of lumber, 15% more or less to suit the capacity of vessel, if the vessel took more than the specified quantity plus the 15%, the seller was not obliged to deliver that excess up to the capacity of the vessel. If a vessel has a capacity of two million feet, and there is a contract for 1,300,000 feet, 15% more or less, the buyer could not claim the entire two million feet to suit the capacity of the vessel from us. As matter of custom he would be entitled under such a contract to the maximum of his contract. That would be 1350M plus 15 per cent." (Record p. 287.)

Some effort was made on the trial to show that the "Marston" was delayed in reaching her loading port at Astoria, through the agreement of plaintiffs permitting her to return from Australia with wheat instead of in ballast. The plaintiffs chartered the "Marston" in 1916 (Record pp. 261, 262). Her cancellation date—that is, the date at which she had to be at Astoria, or the charter be canceled at plaintiffs' option—was March 1, 1918. On September 19, 1917, plaintiffs sent defendant specifications for her lumber (Plaintiffs' Exhibit 7, Record p. 91). The "Marston" was then ninety-three days out from the Columbia River for Melbourne (Plaintiffs' Exhibit 8, Record p. 93). On September 20, 1917, defendant informed plaintiffs that the "Marston" had very little chance of commencing to load at Astoria in December, and notified plaintiffs that "*as before intimated to you under no conditions could we commence loading this vessel later than December on the old contract, which provides for \$9.50 base G list*" (Plaintiffs' Exhibit 8, Record p. 93). Plaintiffs were then advised on September 20, 1917, that the lumber would be refused by defendant (Plaintiffs' Exhibit 8, Record p. 93); on September 27th plaintiffs made formal demand (Plaintiffs' Exhibit 10, Record p. 95); on October 1st it was refused (Plaintiffs' Exhibit 11, Record p. 96). There was then no hope of getting the "Marston" to Astoria in December, 1917, and on October 17, 1917, plaintiffs modified her charter to permit her to return with wheat in lieu of ballast, for which they were paid \$5,000 (Plaintiffs' Exhibit 25, Record p. 261). Plaintiffs had

endeavored to get defendant to postpone the loading date of the "Marston," and had offered defendant part of the money which they could get for permitting the "Marston" to return with cargo, for plaintiffs obviously wished to load the "Marston" directly under their favorable contract. But Mr. Baxter was obdurate. If they could not get the "Marston" to Astoria by December, 1917, they could not get their lumber—except at his new price—and that was all there was to it.

Counsel argue as to the necessity for the presence of the "Marston" in order to determine the quantity of lumber deliverable under the contract.

We assume it unnecessary to comment on the testimony quoted by counsel, which is to the effect that the exact quantity that a vessel can carry cannot be determined until the vessel is loaded. It is precisely for that reason that the contract contained the clause "15% more or less to suit capacity of the vessel," a term of patent benefit to the buyer.

In support of the contention that the contract was for a capacity cargo for the "Marston," irrespective of quantity, plaintiff in error cites *Harrison v. Micks, Lambert & Co.* (Brief p. 65) and other precedents. These cases all go to the point that the sale of a definite lot of goods, with an estimate as to the quantity, is the sale of that particular lot, and that the estimate is such and nothing more. With that rule we are in entire accord.

Thus in *Harrison v. Micks, Lambert & Co.*, 14 Aspinall M. L. C. (N. S.) 76, the first case cited by de-

fendant, is typical of this line of authorities. In that case the buyer agreed to purchase, and the seller agreed to sell, *the "remainder"* of the cargo of a vessel, which had been discharged into a warehouse at Hull, which the seller estimated at 5400 quarters. It was expressly stipulated that the buyer should have *the "remainder of the cargo"*, and this was confirmed by correspondence between the parties. It turned out that the amount of *the remainder* in question was 5974 quarters. The court sustained the contention that what was sold was *the remainder* of the wheat, regardless of the estimated quantity, and likened the case to those in which the subject matter of the sale is described in its entirety, the quantity being estimated. Thus the court referred to *McLay & Co. v. Perry & Co.*, where the parties were dealing with a *heap* of scrap iron, and where the fact that the estimate of the quantity in the heap was incorrect was held to be quite immaterial.

In the case at bar the subject matter of the contract is 1,300,000 feet, fifteen per cent. more or less to suit capacity of the vessel. The case, therefore, falls within the rule of the decisions of which *Cabot v. Winsor*, 83 Mass. 546, and *Peterson v. Chaix*, 5 Cal. App. 526, are typical.

Levy v. Burke, 2 Times Law Reports, 898, cited by plaintiff in error (Brief p. 65):

The material parts of the contract are: "We have this day bought from you as agents of the Browse Island Guano Company (Limited) of Adelaide, a *cargo* of Browse Island Guano expected to arrive per "Alert"

at Hamburg, about 450 tons at 1/9d. per unit of Tribasic phosphate of lime per ton ex ship "Hamburg".

Lord Esher stated that effect must be given to the word "cargo" without requiring the quantity specified, and where the buyer contracted for a "cargo" and mentioned the quantity (unless something plainly shows the contents to be intended) the governing word was "cargo" and the buyer was bound to take the cargo whatever its quantity might be

This case is readily distinguishable as the parties had in mind a cargo which had already been shipped.

Borrowman v. Drayton, 2 Exchequer Division 15, cited by plaintiff in error (Brief p. 65):

In this case plaintiffs sold to defendant a cargo of from 2500 to 3000 barrels of petroleum, to be shipped from New York. The plaintiffs chartered a vessel on which they placed 3000 barrels of petroleum, to be delivered to the defendant, but as this did not fill the ship, 300 additional barrels were placed on board, for which separate bills of lading were issued. It was held that the plaintiffs could not be compelled to take the 3000 barrels in question because they did not constitute the cargo of the ship. The court said:

"There are various reasons why a purchaser may wish to buy the whole quantity of goods loaded on board a particular vessel. It enables him to select the port of discharge, to appoint the place in the port at which the discharge is to take place, to be free from the inconvenience of others persons' goods being unloaded at the same time with his own, and from the competition arising from other persons' goods being ready for sale, at the same place, and at the same time, with his."

We submit the foregoing excerpt clearly distinguishes that decision from the instant case. There the buyer, for reasons of his own, purchased a cargo, and he desired the entire cargo. Here the plaintiffs purchased a quantity of lumber, with a fifteen per cent. variation to be controlled by the capacity of the vessels on which they expected to load that lumber. In *Borrowman v. Drayton* the quantity deliverable was the entire cargo. In this case it was a specific quantity, fifteen per cent. more or less, and if the cargo capacity of the vessels which the buyer expected to use in this case had exceeded the quantity named by more than fifteen per cent., the excess would not have been deliverable to the buyer here, although necessary to make up the cargo (Record pp. 135, 193, 173, 208, 246).

The stipulations in respect to the vessels in this case are, as we have urged, stipulations for the benefit of the buyer, and nothing in the opinion in *Borrowman v. Drayton* indicates that the court there did not consider the stipulations for the buyer's benefit, or that the buyer could not waive the stipulations. On the contrary, the trend of the opinion is that the buyer in that case could have waived the requirement that the quantity deliverable to him should be the whole cargo.

Pembroke Iron Co. v. Parsons, 5 Gray 589, cited by plaintiff in error (Brief p. 67), decided that a contract for a cargo to be shipped by a designated bark was complied with, although the quantity carried was less than the estimated quantity.

The court said:

“The figures at the bottom ‘about 300 to 350 tons,’ are undoubtedly to be taken as a part of the contract. But taken with the context, they manifestly express an estimate only, and do not control the descriptive clause designating and limiting the subject of the contract. The defendant having delivered a full cargo, has performed his contract.”

In

Bowes v. Shand, 2 App. Cas. 455, H. of L., cited by plaintiff in error (Brief p. 69), it was held that a contract for 300 tons of rice, to be shipped by a named vessel during the months of March and/or April, 1874, was not complied with, shipment having been made during the month of February. The buyer insisted on his right to the time of delivery as specified, and the decision was that the time of delivery could not be varied by shipment in a different month than that agreed upon. The decision is not at variance with any contention that we make in this case.

V.

PLAINTIFF IN ERROR'S FIFTH CONTENTION

(Brief pp. 70-74).

Defendant's next point is that the presence of the “Marston” was necessary to fix the time of delivery.

It seems clear that the obligation of the defendant was to deliver at any time during the months of October, November and December, 1917. The contract so reads. Furthermore, the defendant would have the benefit of notice by way of specifications, which would have to be furnished beforehand. The obligation to

deliver at the rate of 60,000 feet per day would arise on the expiration of reasonable notice, as the specifications require. Nothing in the contract justifies the conclusion that the provision for October-November-December delivery made the time of delivery optional with the defendant within that limit.

A reference to the contemporaneous contract between The Charles Nelson Co. and plaintiffs, upon which the present contract was based, makes it clear that the arrival of one or more of the vessels that were to lift this lumber was not in contemplation by the parties as the element fixing the time of delivery.

VI.

PLAINTIFF IN ERROR'S SIXTH CONTENTION

(Brief pp. 74-81).

Defendant's next point is that the presence of the "Marston" was necessary to fix the place of delivery (Brief pp. 74-81).

We submit that the whole argument on this subject is answered by the fact that delivery on the wharf, as called for in the contract, completed defendant's obligations in this respect, whether a ship was alongside the wharf or not. In point of fact, the provision in respect to delivery is a price term, and not otherwise a material covenant or condition in the contract. It so appears in the original agreement between plaintiffs and The Charles Nelson Company (plaintiffs' Exhibit 2, Record p. 71), where it is said:

“Price \$10.00 per thousand base ‘G’ list less 2½ and 2½ f. a. s. mill.”

And it so appears in the acknowledgment of order furnished by defendant for plaintiffs’ signature, where it is said:

“Notes. This price is for delivery f. o. b. mill wharf Knappton within reach of vessel’s tackles and/or on barges a. s. t. mill wharf Knappton, Wash.” (Plaintiffs’ Exhibit 4, Record p. 82.)

Under contracts providing for a delivery “f. o. b. vessel” it is sometimes necessary that the vessel be tendered. But even under defendant’s construction of this contract it was not incumbent on plaintiffs to *tender* the “Marston”. The most defendant claims is that the “Marston” should have been at the wharf and that plaintiffs should take from the wharf the delivery which defendant should have had there completed. But the fact remains that under the authority of *Meyer v. Sullivan*, and the cases therein cited, even the naming of the “Marston” as the point of delivery would not have excused defendant from performance, the “Marston” not being present. In other words, the instant case is very much stronger in support of our contention than *Meyer v. Sullivan*, and the cases therein relied upon. For in this case the mill wharf is designated as the place of delivery, and the mill wharf, of course, was there. All of the provisions about ship’s tackles, etc., etc., were clearly terms for the benefit of the buyers; terms which, under the decisions cited by us (*supra*), might be waived by the buyer, and are not available to defendant in seeking to evade its obligation. In making

its delivery to the mill wharf it could make no difference to the defendant whether the "Marston" lay alongside or not.

As the witness Comyn testified:

"With respect to the place of delivery, the point where the mill had to put the lumber, there would not be a particle of difference whether there was a vessel alongside the mill wharf or a barge. The mill would put the lumber on the same spot on the wharf, whether it was for delivery to a vessel or to a barge." (Record p. 89.)

The witness further testified:

"When the memorandum says, 'This price is for delivery f. o. b. mill wharf,' it means the price covers delivering that lumber on the mill wharf instead of back away inside the mill. In other words, the delivery was to be on the mill wharf. 'f. o. b.' means free on board the mill wharf. It differentiates between the mill wharf and the interior of the mill, and that price covered delivery on the mill wharf." (Record p. 89.)

VII.

PLAINTIFF IN ERROR'S EIGHTH CONTENTION

(Brief pp. 85-90).

Plaintiff in error enumerates certain "benefits" under the contracts which it claims to have based on the presence of the "Marston".

First: That the cargo sold would be exported. We see nothing in the contract about that, but in any event the record shows that the specifications were for export lumber, which could be sold only in Australia (Record p. 302), and, as Mr. Baxter wrote to the Knappton mill,

the specifications furnished by plaintiffs were excellent export specifications. See plaintiffs' exhibit 22 (Record p. 110); see also the testimony of the witness Dant (Record p. 123).

Second: That the presence of the "Marston" gave the means of ascertaining the time at which delivery would be required. We have already considered this point under plaintiff in error's fifth contention and noted that specifications would have to be furnished. Reasonable notice would thus be given of the time when delivery would be demanded. The record also shows that at best the period of delivery is a guess, when this is fixed with reference to the arrival of a sailing vessel more than a year forward (Record pp. 103, 118, 235). The contract as originally made with The Charles Nelson Co. specified a six months' period for delivery, with no reference to any vessel. In the subsequent contract, drawn by Mr. Baxter, the period of delivery was fixed from October to December, 1917, and within those dates, we submit, defendant was bound to deliver.

Third: That the naming of the "Marston" gave some idea as to the quantity of lumber to be cut. This has been fully discussed. The quantity was 1,300,000 feet 15 per cent, more or less. Defendant says that it would have had some idea, derived from the record of the "Marston's" previous loadings, of how much lumber the mill would have to cut. The specifications actually furnished, and which the defendant ignored, were for the "Marston". (Record p. 304). As the record shows, these specifications were cut by Mr. Dant's mill and filled the

vessel, requiring for that purpose within one per cent. of 1,300,000 feet (Record p. 304).

Fourth: That the naming of the "Marston" was an assurance against speculation on the part of the buyer. Here the assumption seems to be that the speculative rights under this contract rested wholly with the seller.

It is undisputed in the testimony that the arrival of a sailing vessel within a period of three months cannot be projected a year in advance (Record pp. 118, 235, 103). The arrival of the "Marston" between October and December, 1917, was, therefore, entirely problematical at the time the contract was made (October-November, 1916). If the vessel failed to arrive, defendant, under its position, could at its option force the plaintiffs to pay damages for not taking the lumber on the "Marston", or defendant could refuse to deliver the lumber. It is obvious what would have happened if the market, instead of going up, had gone down. On defendant's position, therefore, the contract had speculative rights, but these belonged wholly to the defendant.

Nothing in the contract indicates that the parties intended to confer upon the seller any such privilege. On the other hand, the sale of a given quantity, fifteen per cent. more or less to suit capacity of buyer's vessel, is obviously a sale of that quantity, with the right of the buyer to increase or decrease it according to his legitimate requirements in loading the vessel. It is our contention that such a clause is wholly for his benefit. If he chooses to waive the benefit, he must take the quantity specified without the margin allowed him. We

do not contend that plaintiffs were entitled to 1,300,000 feet, fifteen per cent. more if the market went up, and fifteen per cent. less if the market went down. We do contend that if they put the "Marston" alongside the mill wharf, they were entitled to 1,300,000 feet, with fifteen per cent. more or less as might be necessary to load the "Marston". To load the "Marston" was their privilege. The variation from 1,300,000 feet within the range of fifteen per cent. more or less was granted them under the contract only in connection with that loading privilege.

Fifth: The fifth "benefit" has already been discussed by us. The "Marston" was not concerned with the "mode of delivery". Delivery was the same whether a ship was there or not. As the witness Comyn said:

"Assuming that this was an option in favor of the mill, whether they would deliver on wharf or on barges, and assuming that the mill delivered it to the barges, it would not make a bit of difference in the method of delivering to barges if the barges lay alongside the ship or did not lay alongside the ship; they would have nothing to do with loading that lumber on to the ship. In the case of delivery to barges, the obligation of the mill would cease, and it would have performed its part of the contract when it put the barges alongside the ship, and if there were no ship it would cease as soon as it was on the barges. It would cease as soon as the lumber was on the barges if they sold it on the barges. If the mill had an option to deliver to barges, and it exercised that option, the obligation of the mill would cease when the lumber was on the barges. After that time it would be the obligation of the buyer to take the lumber from the barges, they would have to load it from the barges on to the ship." (Record p. 90.)

VIII.

PLAINTIFF IN ERROR'S NINTH CONTENTION

(Brief pp. 90-94).

Plaintiff in error contends that the judgment should be reduced by 15%.

This contention of plaintiff in error is based upon a claim that the contract was for "1,300,000 feet, 15% more or less". The wording of the contract was "1,300,000 feet B. M. 15% more or less to suit capacity of vessel" (Record p. 5). Judge Bean held "the contract names the quantity and the expression therein '15% more or less to suit capacity of vessel' would simply allow the specified quantity to be varied to that extent if the named vessel had been tendered as the receiving medium, but the failure to tender it would not relieve the defendant from making delivery if demanded of the specified quantity" (Record p. 61).

The privilege of varying the quantity within the limit 15% more or less in order to suit the capacity of the vessel was a privilege for the benefit of the buyer which, as pointed out above, the buyer could waive. The vessel not having been tendered, this privilege could not be exercised, and accordingly the specified quantity of 1,300,000 feet must stand.

The contract cannot be interpreted as giving either party an absolute option to a variation within the limit stated, but simply allows for a variation from the definite quantity stated within the prescribed limits in order to suit the capacity of the vessel, if a vessel should be tendered.

There is absolutely nothing in plaintiffs' letter of October 10, 1917 (Record p. 97), upon which plaintiff in error relies so strongly (brief p. 91). This letter was merely a demand by plaintiffs for the performance of the contract. In making this demand, and in order to give the defendant the benefit of every doubt, the demand was limited so as to give defendant an option to deliver 15% more or less, although the contract itself gave the defendant no such right. Defendant never complied with this demand. It cannot, therefore, now rely upon the privilege offered to the defendant by the plaintiffs at this time.

Nor is there anything in the passage quoted by the plaintiff in error (brief p. 91) from our brief before the trial court. Aside from the fact that this brief is not a part of the record and is not before this court, it is apparent that the quotation is absolutely in accord with our present position. If the vessel had been tendered and its capacity had been 15% less than 1,300,000 feet, then the defendant would have been obligated to deliver only that minimum amount, but in any and every event it was bound to deliver at least that much. Since the vessel was not tendered and since, as a matter of fact, its capacity was practically 1,300,000 feet (Record p. 304), this minimum cannot apply, and the defendant was obligated to deliver the specified quantity, 1,300,000 feet.

The cases cited by plaintiff in error (brief pp. 92 to 94) are clearly distinguishable.

In *Washington Lumber Co. v. Midland Co.*, 194 Pac. 777, the contract required the cars to be loaded to their

minimum capacity. There was no requirement that defendant load more than the minimum capacity. It was, of course, correct, therefore, to limit the recovery to the minimum capacity of the number of cars covered by the contract.

The other cases cited by plaintiff in error are simply cases where the contract allowed a variation within certain limits, without adding any qualification such as that in the present case, "to suit capacity of vessel". It is obvious that cases of this kind can be of no assistance in construing a contract like that involved in the present case. It will be noted, however, that a contract such as those treated in the cases cited is ambiguous, since it does not appear whether the option to select the precise quantity to be sold is to rest with the seller or with the buyer. Of course, if the option rests with the buyer, then, even if the present contract were of the same class as that construed in these cases, the judgment would have to be affirmed, since the plaintiff would have had the right to elect either a 1,300,000 board feet or the maximum of 1,495,000 feet.

While three of the cases cited assume that this option rests with the seller, without giving any reason for it, the last cited, *Consolidated Water Co. v. Louisville Herald*, 211 Ill. App. 569, holds that the option rests with the buyer and is, therefore, an express authority in our favor. A similar assumption was made in *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, and the point has been directly decided this way in *Highlands Chemical Co. v. Matthews*, 76 N. Y. 145; *Ready v. Fulton Co.*, 179 N. Y. 399; 72 N. E. 317;

Farquhar Co. v. New River Co., 84 N. Y. S. 802, and *Dupont Co. v. United Zinc Co.*, 85 N. J. L. 416; 89 Atl. 992. Similar rulings and elaborate discussions of the reasons why such an option should rest with the buyer in cases similar on the facts to that at bar are found in *Taylor v. Niagara Bedstead Co.*, 102 N. Y. S. 173; *DeGrasse Paper Co. v. Northern N. Y. Coal Co.*, 179 N. Y. S. 788, and *Southern Publishing Association v. Clements Paper Co.*, 139 Tenn. 429; 201 S. W. 745.

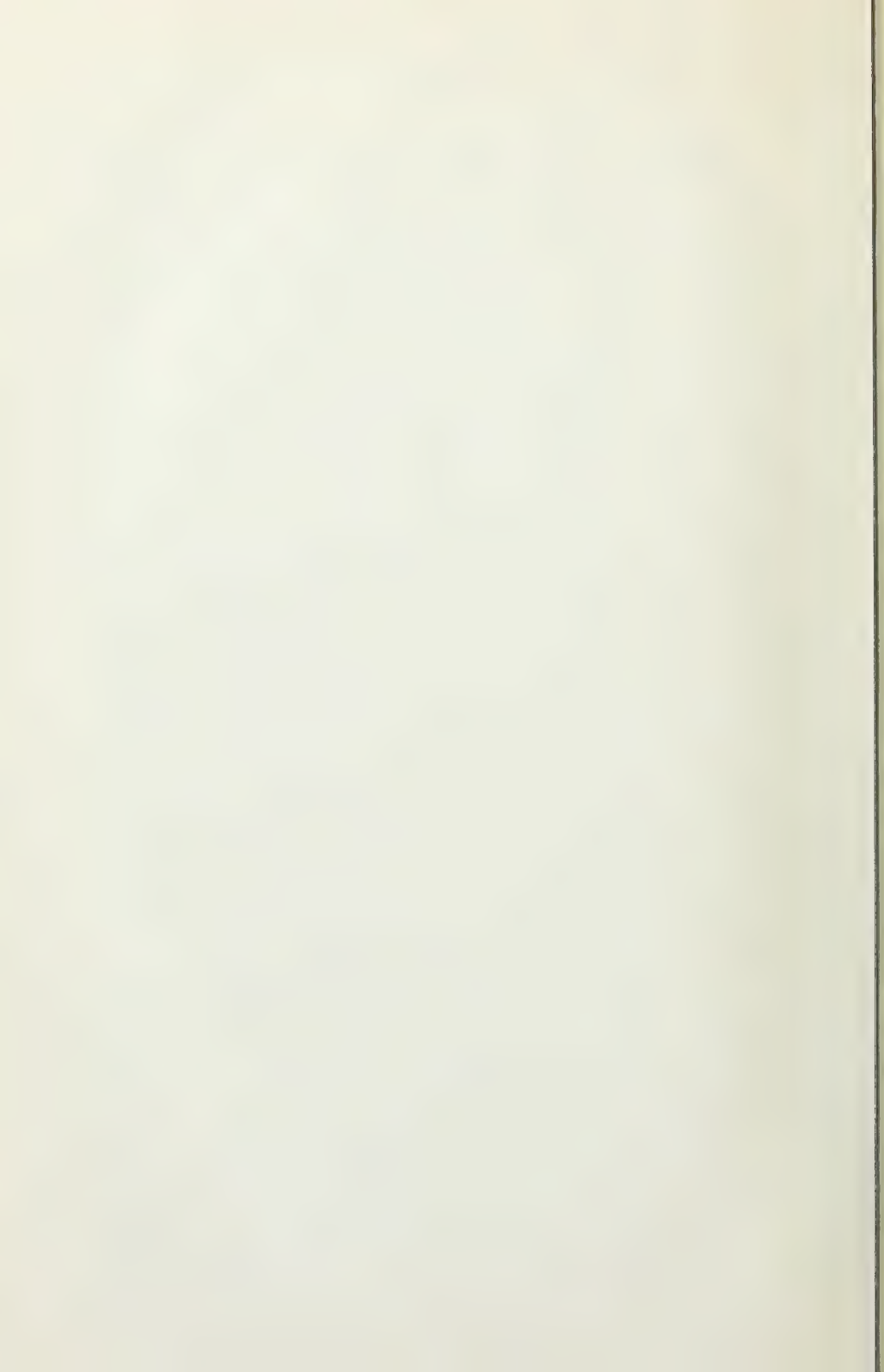
Therefore, even if the contract is to be read as claimed by plaintiff in error in arguing this point, "1,300,000, 15% more or less", nevertheless, since the option in such a case rests with the buyer, the judgment must be supported. It is quite clear, however, that the contract cannot be given the reading suggested by plaintiff in error, and that the margin of variation was allowed solely in the event that a vessel was tendered in order to suit the capacity of the vessel. It was clearly not the intention to allow the seller to speculate on the market and, if it fell, to compel plaintiff to take 1,495,000 feet, but to refuse to deliver more than 1,105,000 feet on a rising market, such as actually existed.

It is respectfully submitted that the judgment must be affirmed.

Dated, San Francisco,
October 22, 1921.

E. S. PILLSBURY,
F. D. MADISON,
ALFRED SUTRO,
H. D. PILLSBURY,
OSCAR SUTRO,

Attorneys for Defendants in Error.



No. 3753.7

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

DOUGLAS FIR EXPLOITATION & EXPORT COMPANY

(a corporation),

Plaintiff in Error,

vs.

W. LESLIE COMYN and BENJAMIN F. MACKALL,

co-partners doing business under the firm name

of COMYN, MACKALL & COMPANY,

Defendants in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

CHICKERING & GREGORY,

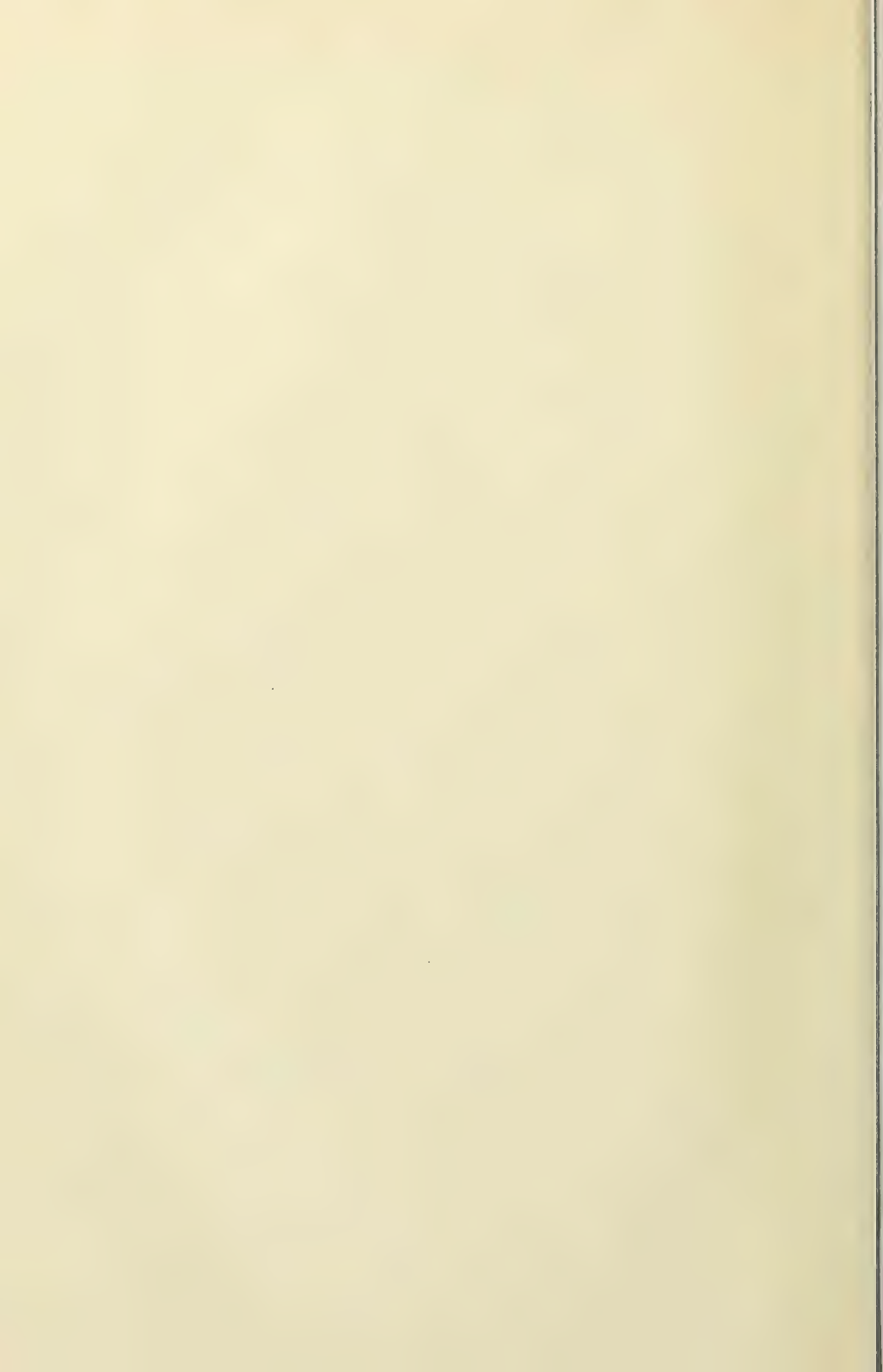
McCLANAHAN & DERBY,

Attorneys for Plaintiff in Error.

FILED

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F. D. MONCKTON,
CLERK



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REPLY BRIEF FOR PLAINTIFF IN ERROR.

It is to be regretted that in this case of such general importance to the export shipping interests, the court should not have had the benefit of full oral argument. As may be remembered the forty-five minutes allowed the writer was entirely inadequate for the presentation of defendant's contentions and we believe much labor would have been saved the court in this important case, had both counsel been unrestricted in argument as to time.

I.

**THE DELIVERY DATE CONDITIONED BY THE NAMING OF THE
“W. H. MARSTON”.**

Our contention that the naming of the “W. H. Marston” conditioned the delivery date of the lumber sold as her cargo, and, therefore, was a provision of the contract for the benefit of the seller which could not be waived by the buyer alone,—was answered by the suggestion, that as the contract imposed upon the buyers the duty of furnishing the seller with specifications for that vessel’s cargo,—the law would give the seller a reasonable time after the receipt of such specifications within which to cut and prepare the lumber for delivery. We submit, that this ingenious argument does not answer our contention. There is no need, under the contract in suit, for the application, of the *reasonable time* principle to the cutting or preparation of the specification lumber, except in the improbable situation where the furnishing of such specifications is delayed to such an extent as to embarrass the mill. As for instance, if the furnishing of the specifications is so delayed as to make it impossible for the mill to cut the lumber in time for its delivery to the vessel which *has arrived* before the expiration of the agreed delivery date,—the principle would then probably apply. But such a situation does not answer the contention that the *arrival* of the named vessel within the agreed loading period, fixes the commencement of the delivery date, and that the time of such arrival can be approximated by the seller through sources which are independent of the buyers, and that for the buyers to deprive the seller of

this means of ascertaining the time, in advance, when it will be called upon to meet its obligation; is to take from it an important and valuable benefit given by the contract.

The provision of the contract relative to specifications has nothing whatever to do with the delivery date of the cargo. Specifications may be furnished even before the commencement of the 90-day delivery period, without effecting in the least the delivery date. They *must* be furnished within a reasonable time before such period actually begins to run, but the time of its commencing to run, is established solely by the arrival of the named vessel within the agreed loading dates. We find in the record no basis for, or confirmation of, Counsel's inventive suggestion. His client, Mr. Comyn, who is a manufacturer of lumber, whose experience extends to the furnishing of export cargoes under contracts calling for named carrying vessels, does not seem to appreciate the attempt which is being made to connect the time of furnishing the specifications with the ascertainment of the time of the commencement of the delivery: "*60 M feet per working day or pay demurrage as provided by charter party*" (Record page 85). On the contrary, Mr. Comyn's testimony fairly and clearly substantiates our contention as to the value to the seller of naming a vessel whose actual arrival within the agreed period, fixes the time when the loading lay days are to commence. He testified:

"It is certainly an advantage to the loading mill to know with measurable definiteness the time when they would be called upon to cut a cargo of lumber.

The naming of an exporting vessel gives to the loading mill some measure of information on that subject. They can see where she is and follow her movements. They can get information from the "Guide" or some such paper or from the buyer. We have sold f.a.s. cargoes as a manufacturer. We have found that when we extend our delivery dates over a period of, say 90 days, it is helpful to us, as a manufacturer, to know by examining the "Guide" and such papers when the carrying vessel will probably require the lumber, because you will then be guided as to when you shall begin to cut your lumber. It is a matter that the mill likes to know. They might slip in another cargo in the meantime. We have done that before. When we found a vessel was going to be late, we have taken one out of order and put it in. It enables your mill to keep circulating right."

(Italics ours. Record pp. 153, 154.)

This last sentence: "*It enables your mill to keep circulating right,*" confirms our belief that the export cargo business could not be carried on as it now is and has been for years, were it not that the naming of the vessel which is to take delivery, *alone makes it possible*, as a practical business operation, for the seller to allow the buyer an optional date, extending over a period of from three to six months, within which to demand delivery of the named vessel's cargo. A most unusual option. By agreeing upon a certain specific vessel, both buyer and seller are placed upon an equal footing as to the actual date of delivery, for the time when such vessel shall arrive at the agreed loading port is as open to ascertainment by the seller as the buyer. The vessel's arrival is in the nature of a public fact which can be as equally approximated by the one as by the other

through the published information of the vessel's exact movements. Specifications may be furnished months before the vessel arrives, but the mill can only know when they are to be cut, through its knowledge of the date when the vessel will arrive. In the case at bar, the specifications for the "W. H. Marston's" cargo were furnished to the defendant on September 19, 1917, though the vessel did not arrive until some time in May, 1918 (she was loaded with her substituted cargo at Dant & Russell's mill in the latter part of May, 1918, with the same specification lumber called for by the specifications furnished defendant in September, 1917. Dant & Russell's contract for the "W. H. Marston's" cargo was dated December 7, 1917, and the instant suit was filed December 27, 1917, four days before the expiration of the 90-day delivery period called for by the contract (Record pp. 160, 165).

Mr. Dant, plaintiff's witness, also differs with counsel as to the value to the seller of naming a carrying vessel in contracts providing for long optional delivery dates. Mr. Dant testified:

"Our contracts where we have named a sailing vessel to carry the cargo, with the expectation that she will carry it, generally provide for some long period, which we will call the delivery. They usually do, such as 60, 90, 100 or 120 days. The object of providing that long delivery date is the estimated time that the vessel will arrive at the loading port.

Mr. McCLANAHAN. Q. This order, then, with the long delivery date, the named carrying vessel, and the amount of lumber purchased, is sent to the mill; is there any benefit that the mill derives in

such an order through the naming of the vessel?

A. They can look the vessel up if they choose to keep track of the vessel.

WITNESS (continuing). They can find out when they will be called upon approximately to furnish the lumber. When they want that information they look up the position of the vessel, and they do that by an examination of the shipping papers, what we call the "Guide". The "Guide" is a recognized shipping journal which keeps track of the movements of sailing vessels. When the mill has this order presented to it, that they are apt to be called upon in 90 days for the delivery of a certain amount of lumber to a particular named vessel, they can look up in the "Guide" and find out approximately where that vessel is and then approximate when she will be due at the loading port. *That is of value to the mill, in that it gives the mill some idea as to when it shall commence to cut and have the lumber ready."*

(Italics ours. Record pp. 122, 123.)

And again:

"I suppose that the naming of a vessel in a f.a.s. contract gives to the seller some measure of assurance as to when he will have to cut that lumber. In a sale made under "G" list by the Douglas Fir Exploitation & Export Co., the naming of an export vessel gives to the seller some measure of assurance *that the lumber will be exported."*

(Italics ours. Id. page 134.)

Mr. Baxter, defendant's general manager, in enumerating the benefits accruing to the defendant through the naming of the "W. H. Marston" as the vessel to which delivery of the cargo was to be made, testified:

"Second, it would permit us through the shipping papers, to keep track of the vessel's move-

ments and know approximately when she would arrive.”

* * * * *

“The trade papers I have spoken of are shipping papers. They give the position of the vessel on any given day, how many days she is out from one port to another port, or that she is in such a port. Contracts of this character, where the delivery date extends over a period of 90 days, give us the means of knowing in advance when the mill will be called upon to cut the lumber, and we instruct the mill.”

(Record pp. 226, 227.)

The importance to the seller of knowing in advance the approximate time when the delivery of the cargo is to commence, in contracts for cargoes cut to given specifications, where long delivery periods are given, is universally recognized by both buyers and sellers, and the record in the case at bar shows other contracts where the plaintiffs *negotiated especially* so as to be *relieved* from the established practice. As for instance, see plaintiff's letter of September 1, 1917, to the Charles Nelson Co. relative to the purchase of cargoes for the schooners “R. R. Hind”, “Encore” and “Jas. H. Bruce”, where the special “*privilege*” is asked, in certain contingencies, of substituting other vessels, or *barges*, for the three named vessels “*to take delivery of the quantity of about 2,000,000 feet*” (Record p. 305). See, also, plaintiff's later letter of September 5, 1917, in which the purchase is expressly conditioned on the understanding that the cargoes for the named vessels may be “*taken delivery of*” on *barges*, in case the named vessels do not make their loading dates. The

argument used by plaintiffs in support of the granting of the privilege demanded, is interesting and important.

“If your mill is operating at the loading dates named on the respective vessels, and any or all of them should not make the specified loading dates, *you would be at liberty to abrogate the contract,*
* * *”.

(Plaintiff's Ex. No. 31, Record pp. 306, 307.)

It is futile, in face of the record in the case at bar, to contend that the naming of a specific vessel to take delivery of the lumber sold as her cargo, in a contract such as the one in suit, does not condition the time of said cargo's delivery and is a provision of benefit to the seller which the buyer cannot defeat without the seller's consent.

II.

THE SIGNIFICANCE OF THE LETTERS OF NOVEMBER

6th and 8th, 1916.

(Defendant's Exs. “F” and “G”, Record pp. 157, 158.)

It will be remembered that this was the correspondence wherein plaintiffs asked the privilege, which was denied, of substituting other vessels for the “W. H. Marston” and “W. H. Talbot”, in certain contingencies. Counsel, in argument, suggested that when his clients asked that they be given the right of substituting other vessels for the “W. H. Marston” and “W. H. Talbot”, they were doing a vain and unnecessary thing as they had such right anyway as a matter of law. Answering this contention, we submit, that however the law *may have been*, governing the construction of the

initiatory letter of November 2, 1916, had plaintiffs' letter of request of ~~September~~^{Nov} 6, 191~~6~~, *not been written*; there can be no doubt as to the situation *after* that letter had been written and the request *refused*. Under *such* circumstances, the subsequently accepted contract must be read as if it contained an express prohibition against the right of substitution. After the refusal of the request, plaintiffs accepted and approved of the document consummating the contract, namely the "Acknowledgment of Order", dated December 8, 191~~6~~, and under such circumstances they would have been estopped from asserting the right which had been denied them, assuming they had such right before the request was refused, which we by no means concede.

Furthermore, we point out that again counsel and his client differ, as is shown by the latter's dealings, at that time, in the purchase of other cargoes of lumber. On October 29, 1917, plaintiffs received from the Charles Nelson Co. a letter relative to the sale of cargoes for the three named vessels and the closing paragraph of this letter is significant as showing that the substitution of a barge for a vessel was a recognized *privilege* to be had *only through the consent of the seller*, as is also the substitution of one named vessel for another.

"We beg to say that you have the privilege of putting in barges for these cargoes in the event of any or all of these vessels being late, but this does not give you the privilege of substituting the Schr. 'H. D. Bendixen' for the Schr. 'Encore', and to which we cannot agree. It is up to you to take delivery by the Schr. 'Encore' and if not, then by barges."

(Record p. 303.)

The brief and argument for defendants in error deal with this case as if a shipment by a specified vessel was not important or a condition precedent to the consummation of the transaction. The question is asked, what difference did it make to the seller how the cargo was shipped, or whether it was shipped at all, if the purchase price was paid and delivery accepted? This question ignores the issue now before this court, which is, what did *these parties* intend by their agreement? What anyone may at this time conclude was or was not beneficial or harmful to either of the parties is quite immaterial. The case must be controlled by what the parties at that time agreed should be their rights and obligations. They had perfect freedom to place in their contract, if they so desired, an iron-clad stipulation to the effect that the cargo must go by a specified vessel or there would be no sale. There would have been nothing against public policy in such a stipulation, and, therefore, the only question now is whether they did so agree.

It is submitted that the letters of November 6 and 8 conclusively answer this question. They are entirely clear and unambiguous. The question of the substitution of a vessel for the "W. H. Marston" had been raised and definitely decided in the negative, before the time for the delivery of the lumber in question had expired (Court's Finding No. 3, Record p. 54). The buyers, from the time that they received the letter of November 8, knew that the seller had definitely and finally stated that the presence of the vessel in question was a condition precedent to the sale. They had

made no objection to this. Thus the parties had themselves agreed to an interpretation of this contract, before the question at issue here arose, which positively made the presence of the "W. H. Marston", as specified in the contract, a condition precedent to the sale.

The significance of export by a particular vessel is illustrated by the character of the business conducted by the defendant. This business was an *export* business entirely. Defendant did not and could not, within the terms of its charter, make sales of lumber to be used in the United States. Its corporate powers were confined to sales for export.

When the defendant, therefore, entered into a contract for the sale of lumber, it was its duty to confine its obligations to those which it was legally entitled to perform. The designation of a particular seagoing vessel rather than a barge was all-important to the seller, so that it would know that its corporate powers were not being exceeded by a sale for domestic use. Surely a company which is incorporated for the purpose of export trade only has not only the right, but it is its duty, to throw every possible safeguard around its sales, so as to make certain that its corporate powers will not be exceeded. The seller was willing to rely upon the assurance of the buyers that this lumber would be exported to Australia, *provided that that assurance was reinforced by the actual presence alongside the wharf of a deep-water vessel chartered for Australia.* The seller was not willing to rely upon the assurance of the buyers without the presence of this

vessel (and he would have been so obligated had the lumber been delivered upon a barge), because, if so placed upon a barge, and all dominion over the lumber lost by the seller, then the lumber might never have been exported.

It is no answer to this position to say that the *title* to the lumber passed within the State of Washington. The seller has the right to stipulate that the thing sold shall be sent to a particular place even although title has passed.

III.

THE PROVISION IN THE "ACKNOWLEDGMENT OF ORDER", DATED DECEMBER 8, 1916, READING:

"Notes: This price is for delivery F.O.B. Mill Wharf, Knappton, within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf, Knappton, Wash." (Record p. 83).

In speaking of this provision, counsel intimated that the writer's failure to discuss it in his argument was attributable to something other than lack of time. Counsel is mistaken. Not only this provision, but a number of other subjects of vital importance were not spoken of because of a lack of time, and while they are covered in our opening brief, still, had argument been made on them, we believe it might have been helpful to the court.

The particular provision now in question is discussed in our opening brief, commencing at the middle paragraph on page 75 and ending at the bottom of page 79. The contention there made is that plaintiffs at this late

date are attempting, in face of the record to the contrary, to construe the provision as a "*price term*", so as to be relieved of the embarrassment of the situation if it is held to be an optional mode of delivery reserved by the seller.

Our theory of the cause of this litigation rests upon the belief that when the contract in suit was brought to the attention of opposing counsel, after Messrs. Comyn, Mackall & Co. had been advised on September 20, 1917, that the "W. H. Marston" would probably be unable to make her loading date and that if she did not, the contract would not be carried out at the old \$9.50 rate; his advice was, that this provision of the "Acknowledgment of Order" *expressly* gave to the buyers the right to take delivery of these cargoes either f.o.b. (free on board) the mill wharf and/or on barges, at their option. The allegations of the complaint which was subsequently drawn and filed bears out this theory, as do all the steps taken by plaintiffs after September 7, 1917, the date of their letter to the defendant, in which the provision in question is attempted to be paraphrased as follows:

"We will take delivery of this lumber f.a.s. mill Wharf Knappton and/or on barges a.s.t. mill wharf Knappton in the month of December."

(Plaintiffs' Ex. No. 10, Record p. 95.)

Had this provision been correctly construed, we doubt very much whether the failure to secure the "W. H. Marston's" cargo would have been litigated, any more than was the failure to secure the cargo for the "Wm. Bowden", the other vessel which did not make her de-

livery date, and which carried the same loss under documents indential with those of the "W. H. Marston". This, for the reason that at the very time we assume that plaintiffs sought legal advice on their rights, they knew definitely that in similar contracts, with other sellers, providing for cargoes for named carrying vessels, the buyer is always recognized as having no right to substitute barges in case the named vessel fails to make her loading date, *unless such right was expressly and plainly given by the contract* (see closing paragraph of plaintiffs' letter of September 5, 1917, to the Chas. Nelson Co., Plaintiffs' Ex. No. 31, Record p. 306). Counsel's construction, therefore, of a provision of the contract which his clients had always before understood to be an option reserved by the seller giving him two ways of making the delivery, must have been an agreeable surprise, which was well worth adopting,—at least in the case of *one* of the defaulting vessels, considering that lumber had risen in value from \$9.50 to \$22.00 per M feet. Hence, this suit and hence, Mr. Comyn's attempt in his testimony to adopt his counsel's construction, that the provision in question gives to the buyers the right to take delivery on barges. "We decided to take this lumber on barges immediately after he (Mr. Baxter) refused to deliver it to the ship" (Comyn, Record p. 156). And right here it is of interest to read Mr. Comyn's testimony touching the provision in question, the value of which to the seller, is further explained by Mr. Baxter (Record, middle of page 228 to and including first nine lines on page 229).

“When they reserve the right to make delivery on both sides of the vessels, from barges and from the mill wharf, the mill is not delivering to that ship. They are bringing it from some other mill. I have never had a mill reserve the right to make delivery to the ship from both sides of the vessel, from the mill wharf, and from the barges in the water. The lumber is always delivered on the mill wharf, but if it came from a man who had more than one mill, I would say yes, it might be done. I have known of mills reserving that right. I have known the selling agent for a number of mills to do that. That does not always mean that the seller of the lumber reserves the privilege of making delivery from both sides of the ship, one delivery from the mill wharf and one delivery from barges on the other side of the vessel, it means he could deliver them any way he wanted to. He could deliver by barges under these conditions if he wanted to, if that was in the contract. *If it is in the contract, it reserves to the seller the right of making deliveries from either side from other mills.* It means that it comes from another mill. He would not load that off his dock on to a lighter and bring it around to the other side of the ship, because he would simply be throwing away money; he would bring it from some other mill on a lighter. He has that privilege. If he reserves it, that would give it to him. *It would give him the right to make a double delivery.* There would be no objection whatever, provided the ship could handle it. The term ‘a.s.t.’ is a new one in the trade. As I understand it, they have had it in only since the Douglas Fir was put in. That is what they call ‘at ship’s tackle’, which is an unknown term in the trade. The clause, ‘This price is for delivery f.o.b. mill wharf, Knappton, within reach of vessel’s tackles, and/or on barges a.s.t. mill wharf’, refers to the price. It most assuredly does. It says price. It is only a matter of price. It means that the price is for

delivery on mill wharf or on a barge, if they want to bring it by barges. It is to cover the cost of their barges. If they bring it along in barges they have to pay the cost of the barges."

(Comyn, Record pp. 143, 144. Italics ours.)

This testimony is somewhat contradictory, because the witness is evidently trying to help counsel's "*price term*" contention and at the same time is unable to avoid giving expression to what he knows to be the true reason for the provision, namely, that it gives to the furnishing mill the right of making a double delivery in case of necessity—one from the mill wharf to the vessel and/or from barges on the vessel's other side. This latter lumber coming from other mills called into action by the seller to expedite the delivery, and thereby avoid paying demurrage.

The subject of this provision of the contract is discussed in our opening brief (Brief, pp. 75-78), and we cannot do better here than to repeat the question asked there:

"How can plaintiffs assert a right to receive on barges, *with the 'W. H. Marston' not present*, and yet preserve to defendant the right to *make* delivery on barges, at that vessel's tackles, Mill Wharf?"

It is perfectly obvious that plaintiffs' exercise of a right to ignore the "W. H. Marston" and *take* delivery themselves on barges, destroys defendant's right to *make* delivery to the vessel f.o.b. mill wharf and/or on barges a.s.t. mill wharf. The *place* of delivery of the "W. H. Marston's" cargo was already clearly fixed by the contract of November 2, 1916, in these words:

“Cargo to be furnished f.a.s. vessel at loading ports” (Record p. 68),

while the *mode* of such delivery is made optional with the seller by the provision of the “Acknowledgment of Order” of December 8, 1916.

The big facts of this controversy have always seemed to us most significant in considering the construction of this contract: The purchase of four cargoes of lumber for *named vessels*, under the same contract, at \$9.50 per thousand feet; a rise in the market to \$22.00 per thousand feet before the expiration of the delivery date; two of the vessels reach their loading ports before the expiration of the agreed loading time and receive their respective cargoes; the two remaining vessels fail to reach their respective loading ports at the agreed time and lose their right to cargoes; the buyers bring suit to cover their loss on only *one* of the two defaulting vessels. Had the buyers’ right of recovery been based on any clear legal or equitable ground, can it be doubted that they would have brought suit to cover the loss on *both* defaulting vessels? Furthermore, if there is merit in their contention that the subject matter of the purchase was 3,500,000 feet of lumber, and not four cargoes, can any reason be suggested for the failure to sue for the whole loss, being the difference between the amount of lumber received of the 3,500,000 feet and the amount they failed to receive?

IV.

COUNSEL'S CONTENTION THAT THE SUBSEQUENT NEGOTIATIONS OF THE PARTIES IN THE CASE OF THE SCHOONER "WM. BOWDEN" IS EVIDENCE SUPPORTING PLAINTIFFS' CONTENTION THAT THE SALE, AS APPLICABLE TO THE "W. H. MARSTON", WAS OF 1,300,000 FEET OF LUMBER 15%, MORE OR LESS, AND WAS NOT THE SALE OF A CARGO FOR THAT VESSEL.

The phase of this controversy as to what is the subject-matter of the sale, is a vital one, and is entirely independent of the other questions relating to the *benefits* to the seller, which accrued through the naming of a specific exporting vessel (see our opening brief pp. 85-90). If it should be held that not a single benefit accrued to the defendant through the naming of the "W. H. Marston", nevertheless, if the subject-matter of the sale was a *cargo* for that vessel and not a specified number of feet of lumber,— then, of course, it is clear that the subject-matter of the contract cannot be changed by one party without the consent of the other. This important matter is discussed in our opening brief (Brief pp. 46-70), and cases are there cited, which we urge upon the court's careful consideration. The testimony shown by the record is practically all to the effect that if this is a sale of a cargo for the "W. H. Marston", the expression of the contract "1,300,000 15% more or less to suit capacity of vessel", is nothing more than an estimate of the parties as to what the "W. H. Marston's" cargo should be and is given for the purpose of informing the seller of the approximate amount of lumber it will be called upon to furnish for said cargo.

The plaintiff, Mr. Comyn, as well as Mr. Baxter, representing the defendant, both give their understanding as to the meaning and practicable effect of this term of the contract. Mr. Comyn testified:

“The object of putting into our contract ‘to suit the capacity of the vessel’ is just what it states—to suit the capacity of the vessel. Practically it works out that the vessel is completely loaded. When it is completely loaded the contract is fulfilled. If the contract is for that particular vessel, it is fulfilled. Fifteen per cent more or less does not apply if the vessel is at the mill. *If it is a contract for a particular vessel, the contract is fulfilled when the vessel is loaded, if the contract is to suit her capacity, irrespective of whether it is a given number of feet in the contract, if it is a contract for a cargo by the vessel.*”

(Italics ours. Record pp. 151, 152.)

Mr. Baxter testified:

“In f.a.s. cargo contracts there is inserted a definite number of feet with the expression 15% more or less to suit capacity of vessel, to allow a leeway that is estimated sufficient to load the vessel that may later be named. The estimate is determined by the parties as a mutual agreement between buyer and seller.”

(Record pp. 247, 248.)

“The naming of the definite number of feet is an approximation of the cargo that the parties make themselves.”

(Id. 248.)

“The expression ‘15% more or less to suit capacity of the vessel’ means to give the vessel a full and complete cargo.”

(Id.)

“I said this morning that a contract for 1300 M feet 15% more or less to suit capacity in which a vessel is named, is a contract for a full cargo for that vessel, regardless of how much she might take. The purpose of putting in 1,450,000 or 1,300,000, more or less, is merely an estimate between the buyers and the seller that neither objects to, as to what the capacity of the vessel is.”

(Id. 270, 271.)

“In fact, the estimated quantity put in there, 1300 M, means nothing more to us than it would have meant had we omitted it, and just said a full and complete cargo for the ‘Marston’, which is the same.”

(Id. 271.)

Counsel’s attempts to discredit this clear and harmonious view of plaintiffs and defendant as to the practicable meaning and effect of this term by referring to their treatment of the “Wm. Bowden”. This was one of the two vessels which the letter of November 2, 1916, required the buyers later to name. The other was the schooner “Golden Shore”. The “Golden Shore” was named first on February 28, 1917 (Record p. 149), her specifications were furnished and the vessel was loaded within the agreed loading time, which will be remembered was October to December, 1917. The *Acknowledgment of Order*” for the “Golden Shore”, executed and approved before she was named, called for a cargo of one-half of 1450 M, or “725,000 feet, 15% more or less to suit capacity of vessel” (Record, Plaintiffs’ Ex. No. 6, p. 86). The *specifications* for the “Golden Shore” called for two lots of lumber, one of 276,002 feet, and one for 551,979 feet, this last lot to be loaded last.

Combined, these two lots amounted to 827,981 feet, which exceeded one-half of 1450 M, plus 15%, by over 30,000 feet. When thereafter the "Wm. Bowden" was named, defendant objected because the "Wm. Bowden's" maximum cargo if added to the "Golden Shore's", would exceed the contract requirement, which as to the two vessels "to be named", called for cargoes whose combined capacities was to be 1450 M 15% more or less. On receipt of the specifications for the "Wm. Bowden" cargo, defendant wrote to plaintiffs the following letter:

"San Francisco, August 17, 1917.

Messrs. Comyn, Mackall & Co.,
310 California Street,
San Francisco.

Gentlemen:

'WILLIAM BOWDEN'

We acknowledge your favor of the 16th inst., with specification for this cargo, and accept the vessel conditioned on her making the loading date provided in the contract, and with the further understanding that as the original contract, dated November 2, 1916, provides for two vessels to be named with a joint capacity of 1450 M, which is interpreted to mean, as usual, 1450 M, 15 per cent more or less, and as you have already named the 'GOLDEN SHORE' for one cargo and now name the 'BOWDEN' for a second cargo, which vessels combined will probably carry more than the maximum amount of the contract, that you will pay us for all such excess carried by these two vessels over and above the 1450 M plus 15 per cent, at the present market price, namely, \$20 base 'G' list, less 2½% and 2½% for cash.

Please send us the charter-party, in duplicate, for the 'WILLIAM BOWDEN.'

Written in duplicate—please approve and return one copy for our files.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT CO.,

By A. A. Baxter,
General Manager."

(Record, pp. 172, 173.)

The requirements of this letter were promptly accepted by plaintiffs, but the "Wm. Bowden" was never loaded, because she, like the "W. H. Marston", failed to make her loading date, and plaintiffs' contention that the instant contract was a sale of a specific number of feet lumber (3,500,000 feet or 3,750,000 feet, we are not clear for which amount plaintiffs contend), is not assisted by the fact that no demand or claim *was ever made* on defendant for the "Wm. Bowden's" lumber, in the amount of 725,000 feet, 15% more or less, or any other amount.

The contention now made is that the letter just quoted is contradictory of defendant's contention that the subject matter of the sale was four cargoes and not the aggregate of the specific amount estimated by the parties as the capacities of the four vessels.

We submit that Mr. Baxter's explanation of the reason he demanded the then market price of \$20.00 for the *excess* over 1450 M plus 15%, the estimate of the cargoes for the two vessels "to be named",—is logical and entirely in harmony with the claim, that as far at least as the "W. H. Marston" is concerned, a cargo to suit her capacity was a part of the subject matter of the contract. The market was a rising one and there-

fore the buyers' interest lay in securing all the lumber they could get at \$9.50, but in doing so, they are charged with the necessity of preserving good faith, and had they designated as the "to be named" vessels, two whose combined capacities reached several millions of feet, they clearly would have been open to the charge of bad faith. Good faith in their selection of the "to be named" vessels was obviously required and under the circumstances of a rising market, they could not legally include in their purchase two vessels whose combined cargoes would exceed 1450 M feet plus 15%. In naming the "Wm. Bowden", however, this is precisely what they did do and it is to their credit that when the matter was called to their attention, they promptly recognized the justice of Mr. Baxter's construction and acceded to it.

The record makes the situation perfectly clear:

"The 'William Bowden' was one of the unnamed, or one of the to-be-named vessels in the contract. The 'Golden Shore' was one of the to-be-named vessels in the contract. I required of Comyn & Mackall an addition over the agreed \$9.50 base for the 'William Bowden's' cargo, because I had sold him two cargoes for vessels that were named, and 1,450,000, 15 per cent more or less, for two vessels unnamed, that was the combined capacity of the two vessels to be named. When he named the two vessels, their capacity was greater than 1,450,000 plus 15 per cent, and it was therefore mutually agreed that he should pay us our then current price for the excess above 1450 M plus the 15%. If the 'William Bowden' and the 'Golden Shore' had been named in the contract, and their estimated cargo had been fixed at 1450 M feet combined, I would not have demanded the current rate of the com-

bined cargoes then exceeding 15% because the vessels having been named in the contract I would feel under an obligation to give them a full cargo and consider the contract filled, regardless of whether it exceeded or was below the amount estimated, even if it exceeded the 15%."

(Record, Baxter p. 231.)

And again on his cross-examination, Mr. Baxter explains the equity of his contention:

"I will tell you why we demanded of Comyn, Mackall & Co. that they should pay us for the excess that the 'Bowden' and 'Golden Shore' were going to carry in excess of 15%, \$20 base price, instead of \$9.50. They are two entirely different cases. In the case of the 'Marston' I sold him the cargo for the 'W. H. Marston'. It was estimated at 1,300,000 feet 15% more or less, but had she taken 25 or 30 per cent more or less, I was under an obligation to furnish her a full cargo. In the other case I sold him 1,450,000 feet to be lifted by two of his vessels to be named, 15% more or less to suit their capacity. Now, it was evidently his intention, and my expectation at the time the contract was made, to name two vessels within that range. When he named the first vessel, she took considerably over half of it—I forget her name now. When he named the second vessel, she would exceed the contract, and, had I accepted that vessel without protest as coming within that range, I then would have been under an obligation, probably, to furnish it, but immediately he named the second vessel, she, taken in conjunction with what the first vessel had loaded, exceeded the amount I sold him. But that was a case where it was not a named vessel at the time of the contract, but he agreed to name two vessels to me, the capacity of the two combined to be 1,450,000, 15% more or less, and for the excess he had no contract, and I gave it to him at the greater price. He did have such a contract for the excess

on the 'Marston' and on the 'Talbot', because they were named at the time of the sale. He really had two contracts, one for the 'Marston' and 'Talbot', for anything they might carry, and the other for two vessels to be named later, being the exact quantity that he specified, 15% more or less. That is the way the contract works out. It gets that result. That is my interpretation absolutely of this contract for four cargoes."

(Id. p. 272.)

In closing our reply to counsel's argument based on these negotiations for the "Wm. Bowden's" cargo, we cannot do better than refer again to the words of the Supreme Court in *Brawley v. United States*, cited at page 66 of our opening brief:

"Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about' or 'more or less', or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, *in reference to which good faith is all that is required of the party making it.*"

On the general question of the subject matter of the instant sale, we submit that it is difficult to know plaintiffs' exact position. There are indications in the record that their claim is that the subject matter of the sale was 3,500,000 feet, the amount called for by the old cancelled contract with the Charles Nelson Co.; there are

also indications that their claim is for 3,750,000 feet, the aggregate of the estimates of the four cargoes called for in the instant contract. As a matter of fact, that part of the contract which was carried out, namely: the furnishing of the cargoes for the "W. H. Talbot" and the "Golden Shore", shows that while plaintiffs furnished to defendant specifications for only 930,000 feet for the "W. H. Talbot's" cargo, the vessel was actually loaded with 971,974 feet, and this amount added to the "Golden Shore's" cargo, say of 827,981 feet, makes a total of 1,799,955 feet, as the amount of lumber plaintiffs received under their contract which they claim called for 3,500,000 feet or 3,750,000 feet. If 1,300,000 feet claimed by plaintiffs in the present suit be added to the amount already received by them, the total is 3,099,955 feet. On plaintiffs' contention therefore, what has become of the difference between what they have received and now claim, call it 3,099,955 feet, and what the contract calls for as they now construe it? Why was this suit not brought for the difference between what they had received and the amount which they claim their contract called for? Is it not perfectly clear, under the circumstances, that plaintiffs' instant suit is for damages for failure to deliver a cargo to the "W. H. Marston"? We submit that otherwise their conduct is inconsistent with their claim.

In speaking of the 1,300,000 feet of lumber for the "W. H. Marston", plaintiff Comyn testified:

"We had a purchaser for the lumber at that time. The *cargo* was sold."

(Record p. 156.)

This fact alone, we submit, is conclusive of the question of what the subject matter was of the instant sale. If "*the cargo was sold*", it was a *cargo* which was *purchased* for that sale and not a given number of feet, the exact amount of which could never be known until the vessel was actually loaded. Dant and Russell, competitors of defendant, loaded the "W. H. Marston" eventually with this cargo which was sold and it amounted to 1,314,000 feet (Comyn, Record p. 166). Had the subject matter of the instant sale been 1,300,000 feet, there would have been no necessity for making the agreement read "15% more or less", for the specifications for the lumber footed up exactly 1,300,000 feet (see specifications for "W. H. Marston", Record p. 40).

V.

THE SIGNIFICANCE OF WHO WAS RESPONSIBLE FOR THE NAMING OF THE VESSELS IN THE CONTRACT.

Counsel's argument pointed to the contention that the naming of the four vessels was a matter in which the plaintiffs were solely interested. Here again it is difficult to square his contention with the view of his client, for it was perfectly clear at the trial that Mr. Comyn did his best to convey the impression that Mr. Baxter was responsible for naming the "W. H. Marston" and the other vessels in the contract. Mr. Comyn on this point is undoubtedly right in part. Of course, the plaintiffs held the charters for these vessels and must have so advised Mr. Baxter, and of the fact that they were to be used, but on the other hand, it is perfectly clear

that the Douglas Fir Exploitation & Export Co. could only sell the lumber for export and it would have been the height of folly for it to make a sale and not provide some assurance of the lumber being exported by the buyer. The naming of an exporting vessel as the direct receiving medium for the lumber's exportation, or securing the agreement of the buyers to later name such a vessel, would be a necessary precaution *in every contract the defendant should make*, and certainly the present one was no exception. It is significant in this connection to know that though the Charles Nelson Company contract did not expressly name an exporting vessel, but purported to be simply the sale of 3,500,000 feet of lumber, for export (Plaintiffs' Ex. No. 2, Record p. 71), the contract in suit, which was supposed to take its place, called expressly for four cargoes for four specifically named or to be named vessels, and the preparation of the writing constituting the contract which showed this, was the work of the defendant. The following testimony on this point given by Mr. Comyn, is highly significant:

"In this particular matter it was not the intention originally that this should be a cargo for the 'W. H. Marston'. I did not say just a little while ago that it was. The original intention was that we bought 3,500,000 feet, 15 per cent more or less.

Mr. McCLANAHAN. Q. I mean when you signed this contract on November 2d, that was your intention then, to load that on the 'W. H. Marston', to suit her capacity?

A. It was put in there by Mr. Baxter."

(Record p. 152.)

(The witness had just previously testified: "When this letter was signed, initiating the contract, I was intending to use the 'W. H. Marston' for a part of the purchase." Record p. 150.)

Again this witness testified:

"Our position in this case is that we purchased one parcel of lumber, and not four cargoes. We made no distinction between any of the vessels. The object of putting into the contract the name of any vessel was because Mr. Baxter put it in. We did not. The object of our consenting to its being put in was that it came written in that way, and my Australian Department passed it as it came in. I mean to say absolutely that Mr. Baxter originated the idea."

(Record pp. 149, 150.)

Perhaps he did, but we know the Douglas Fir Exploitation & Export Company would never have signed the contract otherwise.

VI.

THE REDUCTION OF THE JUDGMENT BY FIFTEEN PER CENT.

We think that counsel wholly failed to meet our contention on this point, namely, that, even on the lower court's construction of the contract in suit, the judgment must at least be reduced by 15%.

In our opponent's brief all of the cases cited by us on this point are commented on, *except the most important of all* (which we referred to at length)—*Thornett & Fehr v. Yuills*, 26 Com. Cas. 59, decided by the Lord Chief Justice of England.

All of the cases cited in counsel's brief are readily distinguishable on their facts. It is sufficient to cite the language of *De Grasse Paper Co. v. Northern N. Y. Coal Co.*, 179 N. Y. S. 788, on this point. The court there says:

“Construction of a contract of sale calling for a minimum and maximum of the article sold, as to which of the parties has the right to exercise the option, depends very largely upon the facts and circumstances surrounding each contract. It would be useless to try and lay down any general rule.”

We also refer to the following cases on this subject holding the option to be generally with the seller:

Wheeler v. New Brunswick Ry. Co., 115 U. S. 29;
29 L. Ed. 341;

Dupont Powder Co. v. United Zinc Co., 89 Atlantic 992;

De La Pierre Co. v. Chicago Lumber Co., 71 So. 872;

Am. Hardwood Lumber Co. v. Dent, 132 S. W. 320.

In the case last cited the seller, a lumber company, was under contract to cut and sell “at least 500,000 feet and not to exceed 1,000,000 feet” of specified lumber of different dimensions (as in the case at bar). In a suit by the buyer for breach of contract, the court held that the discretion as to the amount to be delivered was with the seller and limited the damages to the failure to deliver the minimum. The court said:

“Therefore, for the purpose of fixing the damages, the kind of lumber on which the damage would

be least should be selected, and the amount on which it is to be computed should be fixed at 500,000 feet, the minimum amount to be furnished under the contract."

Almost all of the cases hinting at a contrary view are from one jurisdiction—New York—and even there, the rule is qualified, as shown above.

We are astonished that plaintiffs should now contend that the words "*to suit capacity of vessel*" not only (a) do not make the sale a sale of a cargo, but also (b) operate to qualify the words "15% more or less". This is going very far indeed (unless, as we contend, the sale *was* a cargo sale). It seems to us plain that the words "*15% more or less to suit capacity of vessel*", even if they do not require the presence of the vessel (as we contend they do), *at least* give the defendant the option of delivering only the minimum quantity. The failure to produce the vessel was the act of the buyers and not of the seller and the buyers should not be accorded a possible advantage by reason of this failure. The suggestion that the "Marston's" capacity was "practically" 1,300,000 (Brief p. 73) is substantiated *only* by what she carried under the Dant & Russell contract in the *Spring* of the year. Under the contract in suit, however, she would have loaded in the late Fall or Winter and would have carried less (see evidence of plaintiff Comyn himself, Record p. 125).

Finally, in *all* of the cases cited, where maximum and minimum quantities are named, the option to take one or the other is always *somewhere*—either with the seller or the buyer.

There is *no case* supporting plaintiffs' contention that any *fixed* quantity must govern. This being so, the option in *this case must* have been with the seller, because the failure to produce the named receiving medium was solely that of the buyers.

The dispute into which the parties have fallen as to this simple subject shows clearly that what was actually sold was a *cargo for the "W. H. Marston"*. That eliminates any such disputes and it was certainly a *benefit* to the seller that such disputes *should* be eliminated. Plaintiffs' argument on this one point, in our opinion, completely demolishes the case they have so laboriously built up in attempting to vary the plain terms of the contract.

We believe our opening brief is sufficiently clear on the remaining contentions as to the value to the defendant in naming specific vessels as the carrying mediums at whose tackles their respective cargoes may be delivered, either from the wharf itself and/or from barges alongside the vessels at the mill wharf, at the seller's option. Although in Judge Van Fleet's decision on our *demurrer to the complaint*, it is held that the provision as to the delivery of the lumber at the ship's tackles was one for the benefit of the buyer alone and therefore could be waived by them; we submit that in view of Judge Van Fleet's later ruling on plaintiffs' *demurrer to our answer*, there is strong ground for the contention that the court's first ruling was not intended to go so far as to touch the question of the necessity of the *vessel's* pres-

ence at the loading dock. This question being again directly raised by plaintiffs' demurrer to the answer, Judge Van Fleet's ruling *then* was in defendant's favor and defendant was thereafter allowed to show as a matter of defense the absence of the "W. H. Marston" during her agreed loading time. Also it is important to remember, that the expressions "at ship's tackles" and "within reach of vessel's tackles", appear *only* in the paragraph of the contract which solely reserves to the *seller* the optional mode of the cargo's delivery.

In conclusion we again submit, (a) that in f.a.s. ("free alongside, within reach of ship's tackles", see "G" List, page 2, copy of which important exhibit in the case was furnished to each member of the court at the oral argument) contracts, where specific vessels are named as the receiving mediums for the lumber sold, the law is well settled that the named vessels must be present to receive delivery at the agreed date and place; (b) that in the instant contract the subject matter of the sale was four cargoes and that the term "15% more or less to suit capacity of vessel", coupled with the term "1300 M" applying to the "W. H. Marston" and "1000 M" applying to the "W. H. Talbot" and "1450 M" applying to the combined capacities of the two vessels to be named, —were but estimates of the amount of the respective cargoes; (c) that the naming specifically of the vessels to which cargoes were to be furnished, suiting their capacities, conditioned the *time*, the *place* and the *quantity* of the lumber sold, which a barge or barges could not do, and moreover was a guarantee and assurance to the seller that the cargoes for the named vessels

would be *exported* and that therefore the sale was one which the defendant could legally make. Moreover, as the contract clearly provides, not only for a *delivery*, but for a *shipment* of the lumber between October 1st and December 31st, 1917 (see "Acknowledgment of Order": "Time of Shipment—October to December, 1917"), it is obvious that a delivery to *barges* to await the "W. H. Marston's" belated arrival at another season of the year (May, 1918), as contended for by plaintiffs, when her carrying capacity might be different, would not meet this condition. The agreement of the parties that the *shipment* also should be made within the agreed time is a condition precedent, the failure of which relieves the seller from making delivery.

Mechem on Sales (1901), Vol. I, Sec. 653.

The question involved in this litigation is of vital importance and this fact is our excuse for this extended discussion which we will now close with a brief distinguishment of the cases cited by counsel. *Meyer v. Sullivan*, *Ellsworth v. Knowles* and *Harrison v. Fortlage* we have already distinguished (Opening Brief pp. 14, 15, 41-44).

The case of *Neill v. Whitworth*, L. R. 1 C. P. 684, cited by counsel, is obviously not in point, for in that case "the defendants offered to deliver it to them at quay weights and *even to cart it back to the quay free of expense*" (18 C. B. at p. 442); or, in other words, to make delivery exactly at the place specified in the contract. In view of the above quoted fact, a great deal of the opinion is pure dicta. As applied to the particu-

lar facts in that case the dicta may be correct, but certainly the case comes far from overruling *Wackerbarth v. Masson* or *Wetherell v. Coape* cited by us in our opening brief (Opening Brief pp. 33, 34).

It is to be particularly noted that in *Wackerbarth v. Masson*, Park, counsel for the defendant, unsuccessfully urged exactly the contention urged by plaintiffs here, but the court held that the buyer, as well as the seller, was bound by the mode of delivery named in the contract.

The cases of *Thornton v. Simpson*, 2 Marsh 267, and *Reade v. Meniaeff*, 7 C. B. 159, deal with contracts for shipment of goods from Russia by an unnamed ship, and, as a matter of *construction*, it was held that this did not confine the shippers to *one* vessel, and that they could ship by several.

We fail to see how these cases bear any analogy to the case at bar. If plaintiffs in the case at bar had offered another vessel in place of the "W. H. Marston", the cases might have some application, although we doubt whether as a general principle it can be said that, in circumstances analogous to those of the case at bar, another vessel can be substituted for a *named* vessel.

In *Bourne v. Seymour*, 16 C. B. 349, defendant contracted to sell plaintiff "about 500 tons" of nitrate of soda, and the contract stated that it was "understood" that said cargo was to constitute a full cargo of the ship "John Phillips", but, if she was unable to prosecute the voyage, *then another vessel could be used*. The "John Phillips" was not large enough to carry the

entire cargo, and it was decided that plaintiff could recover for the difference. The court held that the contract was for "about 500 tons" rather than a complete cargo for the "John Phillips". This was a pure question of *construction*, as in the last two cases cited, and we fail to see wherein it is in point in this case. The fact that another vessel besides the "John Phillips" was authorized by the contract, shows clearly that the sale was not intended necessarily as a cargo for the "John Phillips".

None of plaintiffs' cases are in any way similar to the case at bar, and none of them constitute any authority against applying the doctrine of the f.o.b. cases cited by us beginning with *Wackerbarth v. Masson*.

Dated, San Francisco,
November 7, 1921.

Respectfully submitted,

CHICKERING & GREGORY,
McCLANAHAN & DERBY,
Attorneys for Plaintiff in Error. *84.*

